90-417

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALAN S. KRAMER,

Petitioner,

—vs.—

GAINES W. HAMMOND, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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Dated: September 7, 1990

QUESTIONS PRESENTED

When a New York lawyer, representing California clients engaged in a business transaction centered outside of South Carolina, is sued in South Carolina by a South Carolina participant in the transaction:

1. Is the New York lawyer subject to personal jurisdiction in South Carolina based on plaintiff's purported *prima facie* showing of jurisdiction, or does the due process clause require jurisdiction to be established by a preponderance of the evidence when plaintiff has had an adequate opportunity through extensive discovery to support the jurisdictional allegations of his complaint?

2. In subjecting the New York lawyer to personal jurisdiction, did the South Carolina Supreme Court properly consider convenience to the parties without making a threshold finding that the New York lawyer purposefully established minimum contacts with South Carolina?

3. Could the New York lawyer establish minimum contacts in South Carolina without purposefully directing activities in a manner sufficient either to invoke the benefits and protections of South Carolina law, or to reasonably anticipate litigation in South Carolina?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner Alan S. Kramer and the respondent Gaines W. Hammond, Jr. In addition to petitioner, the complaint in the underlying action names Butler, Means, Evins & Browne, a South Carolina law partnership, and Thomas A. Evins and Stanley T. Case, members of the Butler, Means firm, as defendants. The decisions below concern only Kramer, who was the only movant in the trial court and the only appellant in the South Carolina Supreme Court.

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IN THE

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OCTOBER TERM, 1990

No. _____

ALAN S. KRAMER,

Petitioner,

—vs.—

GAINES W. HAMMOND, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

The petitioner Alan S. Kramer respectfully prays that a writ of certiorari issue to review the opinion and decision of the Supreme Court of South Carolina entered in these proceedings on January 22, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 388 S.E.2d 796, and is reprinted in the Appendix, at 1a-6a.

The unpublished order of the Court of Common Pleas of Spartanburg County, South Carolina, is reprinted in the Appendix, at 7a-8a.

JURISDICTION

The opinion of the Supreme Court of South Carolina was entered on January 22, 1990. A petition for rehearing was filed on January 29, 1990, and was denied on June 11, 1990.[1] The Petition for a Writ of Certiorari was filed within ninety days of June 11, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).[2]

CONSTITUTIONAL PROVISION INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part:

> No state . . . shall deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

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1 The order denying rehearing is reprinted in the Appendix, at 9a.

2 This Court has repeatedly held that cases presenting jurisdictional issues in this posture are final within the meaning of 28 U.S.C. § 1257(a). *See Burnham v. Superior Court*, _____ U.S. _____, 110 S. Ct. 2105, 2109 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108 (1987); *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984); *Rush v. Savchuk*, 444 U.S. 320, 324-25 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288-91 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 88-90 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 195-96 n.12 (1977).

In addition, issue one, which raises the appropriate standard of proof governing a jurisdiction testing motion decided after substantial discovery, "is plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). Neither would it be reviewable by this Court after trial and appeal through the state-court system. The federal issue cannot survive the remand to the trial court because at trial the jurisdictional issue must be determined on the higher preponderance standard, thus foreclosing petitioner from raising the issue that the higher standard should have been imposed in the circumstances presented here at the motion to dismiss stage. *Cf. Cox Broadcasting Corp.*, 420 U.S. at 483-84.

Finally, resolution of the due process issue now will avoid subjecting petitioner "to long and complex litigation which may all be for naught if consideration of the preliminary question of [personal jurisdiction] is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

STATEMENT OF THE CASE

In the case below, Respondent, Hammond, a South Carolina resident, claims that his own lawyers, also South Carolina residents, conspired with Petitioner, Kramer, a New York lawyer, to reduce his subscription interest in a Delaware corporation formed to commercialize a medical invention of three California residents (the "California Group"), who were represented by Kramer. (R. 214-15)[3]

Hammond left South Carolina to secure a role for himself in the commercialization of this invention. The invention improved technology for shattering kidney stones noninvasively through extracorporeal shockwave lithotripsy. (R. 892-96) To obtain this role Hammond first met with one of the inventors in Colorado. He then met with the inventors in California at meetings, which were also attended by Kramer, representing the California Group, and Thomas A. Evins and Stanley T. Case, of the South Carolina firm of Butler, Means, Evins & Browne, representing Hammond. (R. 17, 21-22, 219-20)

Following the meetings in California, Kramer drafted agreements in New York to implement the proposed transaction among the parties. Kramer negotiated the terms of these agreements with Hammond's lawyers at meetings in California and New York, and by telephone. (R. 17-18, 21-22) First, he drafted a subscription agreement for a proposed Delaware corporation, initially called Hammond Technologies, Inc., and later renamed Medstone, International, Inc. ("Medstone"). (R. 321-27) Second, he drafted a proposed license agreement pursuant to which the California Group would provide the technology to the proposed Delaware corporation. The license required a royalty payment of approximately $1,000,000. Third, he drafted an option agreement,

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3 References are to the Transcript of Record before the South Carolina Supreme Court.

under which the technology offered by the license could be obtained upon payment of the license royalty on or prior to November 8, 1984. The option was issued to Hammond and later assigned to the proposed Delaware corporation pursuant to the subscription agreement. (R. 97) The subscribers for the proposed company's stock were Hammond, the California Group, Kramer, the Butler, Means firm, and three other individuals, who were residents of Virginia and California. (R. 91-92)

To raise the $1,000,000 license royalty the subscribers sought to sell a prototype of the invention to the Michael Reese Hospital and Medical Center ("Michael Reese") in Chicago. (R. 256) Kramer negotiated the contractual arrangement with Michael Reese on behalf of the subscribers in Illinois and by telephone between New York and Illinois. (R. 640)

Michael Reese required a letter of credit as a condition to the purchase. (R. 52-53, 256, 695-700) Hammond sought the letter of credit in Alabama from Dr. Gerald Wallace. (R. 347-48, 419-28, 1042) Wallace required Hammond to provide a guarantee of Wallace's liability under the letter of credit. (R. 426) The November 8th option deadline passed without Hammond providing the guarantee (R. 264) and without Wallace providing the letter of credit. (R. 252-53, 263-64)

When the option expired the California Group allowed Medstone to obtain the license under a revision of the subscription agreement pursuant to which Hammond's interest was reduced from 35,000 to 10,000 shares and those of the California Group, Kramer, and Butler, Means were increased. (R. 91-92, 106) Wallace was allowed to become a subscriber (R. 106) and agreed to provide the letter of credit without the guarantee from Hammond. (R. 866-67)

None of the agreements structuring the transaction chose South Carolina governing law. The option and license agreements chose California law. The agreement with Michael Reese chose Illinois law (R. 717, 754, 779, 941, 1018) and Hammond's agreement with Wallace chose Alabama law.

(R. 428) All of the meetings between participants, or between their lawyers, occurred outside South Carolina, primarily in California, New York, Illinois and Indiana. (R. 17-18, 21-22, 40, 256, 295-96)

On March 12, 1986, Hammond filed the case below.[4] On April 8, 1986, Kramer moved to dismiss Hammond's complaint for lack of personal jurisdiction pursuant to S.C.R. Civ. P. 12(b)(2)[5] on the grounds that the South Carolina long-arm statute[6] did not apply, and that any exercise of jurisdiction by South Carolina would violate the due process clause of the fourteenth amendment. After a year of jurisdictional discovery,[7] the trial court summarily denied Kramer's motion to dismiss. On January 22, 1990, the South Carolina Supreme Court affirmed the trial court decision, and on June 11, 1990, it denied Kramer's petition for rehearing. After the trial court decision, Hammond commenced a substantially similar action against Kramer in New York. *Hammond v. Kramer*, Index No. 21813/87 (Sup. Ct. N.Y. County, Sept. 4, 1987). This action was stayed *sua sponte* by the New York Supreme Court when Kramer promptly moved for summary judgment based on discovery taken in the South Carolina action.

The South Carolina Supreme Court first found Kramer subject to jurisdiction under the South Carolina long-arm

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4 Originally, Hammond sought actual damages in excess of $6,500,000 and punitive damages. (R. 2-13) In 1988, Hammond served and filed a "Proposed Supplemental Amended Complaint," in which he seeks actual damages in excess of $100,000,000, punitive damages, treble damages and attorney's fees.

5 Rule 12 of the South Carolina Rules of Civil Procedure, and accompanying Reporter's Notes, are reprinted in the Appendix, at 11a.

6 S.C. Code Ann. § 36-2-803 (Law. Co-op. 1976), which is reprinted in the Appendix, at 16a.

7 At Hammond's request, the trial court ordered extensive deposition and document discovery, resulting in a record in excess of 1300 pages of deposition testimony and in excess of 1400 pages of marked exhibits. The Transcript of Record before the South Carolina Supreme Court contained 1119 pages, mainly from this discovery.

statute, and then found that the exercise of long-arm jurisdiction comported with due process. The court applied a *prima facie* standard in its two-step approach: "[A]t the pretrial stage of the proceedings, the plaintiff need only make a prima facie showing by pleadings and affidavits." (388 S.E.2d at 798, App., at 4a) Long-arm jurisdiction was upheld entirely on Hammond's allegations that Kramer conspired to commit a tortious act in South Carolina. Due process was evaluated under South Carolina's own due process formula, which requires evaluation of four considerations:

1. The duration of the activity of the non-resident within the state;

2. The character and circumstances of the commission of the non-resident's act;

3. The inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the non-resident; and

4. The state's interest in exercising jurisdiction.

(388 S.E.2d at 798-99, App., at 5a.)

Although the opinion below did not separately analyze the "four considerations," due process was found satisfied based on Hammond's allegations, selected facts from the record without regard to their relevance to required minimum contacts, and the court's convenience finding.[8]

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8 After his petition for rehearing was denied, Kramer moved for a stay of his time to answer pending determination of his petition for a writ of certiorari. This request was denied. On August 9, 1990, Kramer served and filed his answer to Hammond's complaint, specifically asserting as an affirmative defense the existence of an arbitration agreement barring Hammond's claims. On August 10, 1990, Kramer commenced an action against Hammond in the United States District Court for the Southern District of New York pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, requesting an order enforcing the arbitration agreement, which requires binding arbitration in New York City pursuant to the Rules of the American Arbitration Association. *Kramer v. Hammond*, 90 Civ. 5226 (KTD) (S.D.N.Y., Aug. 10, 1990).

REASONS FOR GRANTING THE WRIT

I.

THE SOUTH CAROLINA SUPREME COURT'S APPLICATION OF A *PRIMA FACIE* STANDARD TO KRAMER'S MOTION TO DISMISS IS INCONSISTENT WITH PRINCIPLES ARTICULATED BY THIS COURT IN *CELOTEX*, *LIBERTY LOBBY*, AND *MATSUSHITA*

The evidentiary standard applicable to a jurisdiction testing motion decided after substantial discovery is a constitutional issue of great national importance because (1) it has never been addressed by this Court, (2) the holding below conflicts with principles articulated by this Court in the summary judgment context, (3) there is widespread confusion on this issue in the state and federal courts at all levels, and (4) until this Court definitively resolves this question, the confused situation will continue to disrupt the orderly administration of the law in a context that is certain to arise frequently.

A. Principles governing summary judgment are applicable to a motion to dismiss on jurisdictional grounds decided after a plaintiff has had adequate discovery to support the jurisdictional allegations of a complaint

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court explained that

> the plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.* In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 322-23 (emphasis added). This Court further explained that the standard for granting summary judgment "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Id.* at 323 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (emphasis added)).

In *Liberty Lobby*, this Court pointed out "that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." 477 U.S. at 250 (citing *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943)). This Court "conclude[d] that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages." 477 U.S. at 255. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court warned that "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586 (footnote and citations omitted). This Court also stated in *Matsushita* that "[w]here the *record taken as a whole* could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* at 587 (emphasis added) (citing *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

The doctrinal principles and policies restated and developed in *Celotex*, *Liberty Lobby* and *Matsushita* are equally applicable to a motion to dismiss for lack of personal jurisdiction after a plaintiff has had a full opportunity to support the jurisdictional allegations of a complaint before decision on the Rule 12(b)(2) motion.[9] There is no reason, in logic

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9 At the summary judgment stage, a nonmoving party may seek additional discovery to oppose the motion pursuant to Fed. R. Civ. P. 56(f). *Accord* S.C.R. Civ. P. 56(f). While there is no similar provision in Federal or South Carolina Rule 12(b), there is no reason why a plaintiff cannot seek, nor why a court cannot grant, additional discovery, if necessary, to oppose a 12(b)(2) motion. Almost three-quarters of the states have adopted a proce-

or policy, why a plaintiff afforded a full opportunity to develop jurisdictional facts should escape dismissal when jurisdiction is properly challenged because most courts apply a weak threshold *prima facie* standard to the jurisdiction testing motion.[10] Some courts do apply the preponderance standard to a 12(b)(2) motion, but they are a distinct minority.[11]

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dural system modeled on the Federal Rules of Civil Procedure, including South Carolina, and accordingly this issue is discussed with reference to the federal rules. *See* Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1377-78 (1986).

Moreover, as in case below, discovery is almost always requested and ordered in some form prior to decision of a 12(b)(2) motion. *See, e.g.*, 2A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 12.07 [2.-2], at 12-59 (2d ed. 1990); 4 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 26.56[6] (2d ed. 1989); 5A C. Wright & A. Miller, *Federal Practice & Procedure* § 1351, at 253-59 (2d ed. 1990). *Cf. Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 196 (2d Cir. 1990) ("Plaintiffs conducted discovery for nearly a year.") (summary judgment), *petition for cert. filed*, 59 U.S.L.W. 3094 (U.S. July 24, 1990) (No. 90-207).

10 *See, e.g., Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d at 196-98 (on summary judgment, but extensively discussing standard under 12(b)(2)); *Michigan Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989); *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989); *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989); *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988); *Cutco Indus., Inc. v. Naughton*, 806 F.2d 361, 364-65 (2d Cir. 1986); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1284-86 (9th Cir. 1977); *McClelland v. Watling Ladder Co.*, 729 F. Supp. 1316, 1317-18 (W.D. Okla. 1990); *Cable News Network, Inc. v. Video Monitoring Servs. of America, Inc.*, 723 F. Supp. 765, 766-67 (N.D. Ga. 1989); *Perez-Rubio v. Wyckoff*, 718 F. Supp. 217, 227 (S.D.N.Y. 1989); *Kyle v. Continental Capital Corp.*, 575 F. Supp. 616, 618-20 (E.D. Pa. 1983); *Davis v. Eighth Judicial District Court*, 97 Nev. 332, 337, 629 P.2d 1209, 1212-13, *cert. denied*, 454 U.S. 1055 (1981); *Giachetti v. Holmes*, 14 Ohio App. 3d 306, 307, 471 N.E.2d 165, 167 (1984); *Ben's Marine Sales v. Sleek Craft Boats*, 502 A.2d 808, 810 & n.1 (R.I. 1985); *White v. Stephens*, 387 S.E.2d 260, 262 (S.C. 1990); 2A *Moore's Federal Practice*, *supra* note 9, ¶ 12.07 [2.-2], at 12-55-12-56.

11 *See, e.g., Newhard, Cook & Co. v. Inspired Life Centers, Inc.*, 895 F.2d 1226, 1228 (8th Cir. 1990) (confusingly applying both standards);

Under this Court's summary judgment principles, a plaintiff is not permitted to force a trial on the merits, after adequate discovery, when an essential element of a complaint cannot be supported. After adequate discovery, a plaintiff with a questionable jurisdictional claim should also not be permitted to force a trial on the merits without first establishing jurisdiction by the same preponderance of the evidence standard that will govern the issue on summary judgment, directed verdict, or trial.[12]

B. Federal and state courts have issued conflicting decisions on the evidentiary standard governing a jurisdiction testing motion decided after substantial discovery

If jurisdiction is tested at a preliminary hearing pursuant Rule 12(d),[13] on a motion for summary judgment under Rule

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Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120 (2d Cir. 1984) (following discovery plaintiff must establish jurisdiction by a preponderance of the evidence at a pretrial hearing or trial); *Marshall Exports, Inc. v. Phillips*, 507 F.2d 47, 49 (4th Cir. 1974); *Combs v. Bakker*, 692 F. Supp. 596, 603 (W.D.N.C. 1988), *vacated on other grounds*, 886 F.2d 673 (4th Cir. 1989); *Grill v. Walt Disney Co.*, 683 F. Supp. 66, 67-68 (S.D.N.Y. 1988) ("[W]here, as here, the parties have conducted *substantial discovery* on the jurisdictional issue, plaintiff may be *held to a higher standard of proof.*") (emphasis added); *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1043 n.1 (S.D.N.Y. 1987); *Sterling Indus., Corp. v. Telephone, Inc.*, 484 F. Supp. 1294, 1296 (W.D. Mich. 1980); *DiCesare-Engler Prods., Inc. v. Mainman Ltd.*, 81 F.R.D. 703, 705 (W.D. Pa. 1979); *Felix v. Bomoro Kommanditgesellshaft*, 196 Cal. App. 3d 106, 110, 241 Cal. Rptr. 670, 672 (1987). *Cf. Mid-States Aircraft Engines, Inc. v. Mize Co.*, 467 N.E.2d 1242, 1247 (Ct. App. Ind. 1984) ("party *challenging jurisdiction* must establish the lack thereof by a preponderance of the evidence") (emphasis added).

12 *Cf. KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278-80 (1936); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (competent proof by a preponderance of the evidence).

13 *See, e.g., Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d at 197; *First City Nat'l Bank & Trust Co. v. Simmons*, 878 F.2d 76, 79 (2d Cir. 1989); *Serras v. First Tenn. Bank N.A.*, 875 F.2d 1212, 1214 (6th Cir. 1989);

56,[14] or at trial,[15] jurisdiction must be established by a preponderance of the evidence.[16] In contrast, if jurisdiction is tested early in the 12(b)(2) stage without discovery materials, courts apply the *prima facie* standard, and many courts also "construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction."

Cutco Indus., Inc. v. Naughton, 806 F.2d 361, 364 (2d Cir. 1986); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984); *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Data Disc, Inc. v. Systems Technology Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *Blue Ball Properties, Inc. v. McClain*, 658 F. Supp. 1310, 1315 (D. Del. 1987); *Kyle v. Continental Capital Corp.*, 575 F. Supp. 616, 619 (E.D. Pa. 1983); *Giachetti v. Holmes*, 14 Ohio App. 3d 306, 307, 471 N.E.2d 165, 167 (1984); *Ben's Marine Sales v. Sleek Craft Boats*, 502 A.2d 808, 810 n.1 (R.I. 1985); 2A *Moore's Federal Practice*, *supra* note 9, ¶ 12.07[2.-2], at 12-57 & n.5.

14 *See, e.g., Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 & n.1 (9th Cir. 1986).

15 *See, e.g., Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d at 197; *Michigan Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989); *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989); *Serras v. First Tenn. Bank N.A.*, 875 F.2d 1212, 1214 (6th Cir. 1989); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Data Disc, Inc. v. Systems Technology Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 664 F. Supp. 713, 716 (S.D.N.Y. 1987), *aff'd in part and rev'd in part*, 886 F.2d 497 (2d Cir. 1989); *Giachetti v. Holmes*, 14 Ohio App. 3d 306, 307, 471 N.E.2d 165, 167 (1984); 2A *Moore's Federal Practice*, *supra* note 9, ¶ 12.07[2.-2], at 12-57 & n.5.

16 In addition, if a complaint requests a preliminary injunction, and a defendant moves to dismiss under Rule 12(b)(2), a plaintiff must establish jurisdiction by a preponderance of the evidence. *See, e.g., Visual Sciences, Inc. v. Integrated Communications Inc.*, 660 F.2d 56, 59 (2d Cir. 1981). *Cf. Industrial Elecs. Corp. v. Cline*, 330 F.2d 480, 482 (3d Cir. 1964) (subject matter jurisdiction); *A.H. Bull S.S. Co. v. National Marine Eng'rs Beneficial Ass'n*, 250 F.2d 332, 337 (2d Cir. 1957) (subject matter jurisdiction).

Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989).[17] When jurisdiction is tested at the 12(b)(2) stage upon limited discovery, the *prima facie* standard also generally applies.[18]

The context that has produced significant conflicts dividing the lower courts is when jurisdiction is tested at the 12(b)(2) stage after substantial discovery, but when a 12(d) preliminary hearing is unnecessary. In this situation some courts apply the *prima facie* standard,[19] while others apply the preponderance standard.[20]

As previously stated, when a plaintiff has had an adequate opportunity to support the jurisdictional allegations of a complaint through extensive discovery prior to decision of the 12(b)(2) motion, imposing the *prima facie* standard is inconsistent with the principles articulated by this Court in the summary judgment context. If there are disputed jurisdictional facts after substantial discovery, a court on application of any party can order a preliminary hearing pursuant to Rule 12(d), at which the higher preponderance standard applies.[21] If, however, the material jurisdictional facts are

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17 *Accord Cutco Indus. Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57, (2d Cir. 1985); *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985); *Perez-Rubio v. Wyckoff*, 718 F. Supp. 217, 227 (S.D.N.Y. 1989). *Contra Bracewell v. Nicholson Air Servs., Inc.*, 748 F.2d 1499, 1504 (11th Cir. 1985) (only accept allegations not controverted by defendant's evidence); *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1284 (9th Cir. 1977) ("we may not assume the truth of allegations in a pleading which are contradicted by affidavit"); *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977) (defendant cannot "simply rest on bare allegations of its complaint, but was obligated to come forward with facts, by affidavit or otherwise"); *In re North Dakota Personal Injury Asbestos Litig.*, 737 F. Supp. 1087, 1098 (D.N.D. 1990).

18 *See Morris v. SSE, Inc.*, 843 F.2d 489, 490-92 (11th Cir. 1989); *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1043 n.1 (S.D.N.Y. 1987). *See also* cases cited at note 10 *supra*.

19 *See* cases cited at note 10 *supra*.

20 *See* cases cited at note 11 *supra*.

21 *See* cases cited at note 13 *supra*.

essentially undisputed, as in the case below, a preliminary hearing is unnecessary. If a court, viewing the entire discovery record against the principles articulated in *International Shoe* and its progeny, can come to but one reasonable conclusion as to the jurisdictional issue, it should reach that conclusion at the 12(b)(2) stage. After substantial discovery a plaintiff is in no different posture in opposing a 12(b)(2) motion than in opposing a summary judgment motion. Consequently, the same standard of proof should govern disposition of the jurisdictional issue in either context.

In these circumstances anything less than the more rigorous preponderance standard is inherently unfair, violates "traditional notions of fair play and substantial justice," and is, thus, violative of due process. A defendant should not be forced to go through time consuming and expensive discovery, sometimes as in the case below lasting more than a year, only to have a court ignore evidence adduced in opposition to jurisdiction. Application of the *prima facie* standard requires a court to review only a plaintiff's jurisdictional evidence.[22] This is a waste of party, lawyer and judicial resources.

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22 In *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194 (2d Cir.), *petition for cert. filed*, 59 U.S.L.W. 3094 (U.S. July 24, 1990) (No. 90-207), the Second Circuit recently stated:

> Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, . . . legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's *prima facie* showing may be established solely by allegations. *After discovery*, the plaintiff's *prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant. At that point, the *prima facie* showing must be factually supported.

Id. at 197 (citations omitted). This language states that after discovery a plaintiff must factually support jurisdictional allegations, but implies that a court is not free to consider evidence adduced in opposition to jurisdiction, or to decide whether a rational trier of fact could find for plaintiff on the jurisdictional issue. The implication in *Ball* was made explicit by the Second Circuit earlier. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) ("a prima facie showing suffices, notwithstanding any controverting presentation by the moving party").

Despite feeble attempts to impose the higher preponderance standard in these circumstances,[23] lower courts are reluctant to apply it absent guidance from this Court. This Court should address this issue, and, consistent with principles of due process, mandate application of the preponderance standard by all lower courts when jurisdiction is tested after substantial discovery.

In the case below, application of the preponderance standard to the extensive discovery record taken as a whole would not have permitted a rational trier of fact to find for Hammond on the jurisdictional issue. Thus, Kramer's 12(b)(2) motion should have been granted. (*See* Reason III for Granting the Writ)

II.

BY JUSTIFYING JURISDICTION ON A MIX OF REASONABLENESS AND CONTACT ANALYSIS, WITHOUT INDEPENDENTLY FINDING SUFFICIENT "MINIMUM CONTACTS," THE SOUTH CAROLINA SUPREME COURT STRETCHED THE DUE PROCESS CLAUSE BEYOND ACCEPTABLE LIMITS

This court should decide whether the *World-Wide Volkswagen* reasonableness factors may be used to uphold jurisdiction in the absence of a threshold finding of purposefully established minimum contacts. This is a constitutional issue of great national importance because (1) it has never been definitively resolved by this Court, (2) there is extensive confusion on this issue in the lower courts, resulting in conflicts among the circuits, within the circuits, and among the high courts of the several states, and (3) until this Court authoritatively resolves this question, the confusion in the lower courts will continue to disrupt the orderly administration of justice in circumstances that are certain to arise frequently.

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23 *See* cases cited at note 11 *supra*.

A. This Court's division on minimum contacts and its reliance on "other factors" in striking down jurisdiction in *Asahi* leaves the law of personal jurisdiction fundamentally unsettled

In 1985 this Court articulated a two-branch due process test for state court jurisdiction. *Burger King v. Rudzewicz*, 471 U.S. 462, 471-78 (1985). The first branch, which remains "the constitutional touchstone," requires a state court to determine "whether a defendant purposefully established 'minimum contacts' in the forum state." *Id.* at 474 (citing and quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). This Court further explained that "[o]nce [that issue] has been decided" a court may consider "other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Id.* at 476 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

Less than two years later, this Court was unable to decide whether a third-party defendant established minimum contacts with California because two of three opinions issued in the case divided the Court into conflicting four-Justice pluralities on whether minimum contacts existed. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1987). All members of this Court, except Justice Scalia, however, evaluated the "other factors," and concluded that California's assertion of jurisdiction "would be unreasonable and unfair." *Id.* at 116. Justice Stevens, wrote separately, joined by Justices White and Blackmun, expressing the view that "*[a]n examination of minimum contacts is not always necessary* to determine whether a state court's assertion of personal jurisdiction is constitutional." *Id.* at 121 (emphasis added).

Because of this Court's division over minimum contacts, and the separate opinion of Justice Stevens that "*[a]n examination of minimum contacts is not always necessary*," lower courts have issued confusing and conflicting opinions on the necessity to make a threshold finding of minimum contacts,

before evaluating the "other factors" to determine whether a particular assertion of jurisdiction would offend "traditional notions of fair play and substantial justice.' "[24] This Court should decide this issue now and end the confusion.

B. Because of this Court's split in *Asahi* lower courts have been unable to determine what analysis is required under the due process clause when testing personal jurisdiction

Confusion generated by *Asahi* and *Burger King* has undermined consistency and predictability in jurisdictional decision making.[25] Conflicts at all levels abound and multiply with the publication of each new volume of case reports.

In striking down jurisdiction lower courts are divided over whether the "reasonableness" factors must be analyzed. Following the framework established in *Burger King*, many courts expressly find it unnecessary to reach the reasonableness factors if minimum contacts are lacking.[26] Others, how-

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24 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

25 This Court has stated that the "Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citation omitted).

26 Typical of this view is the First Circuit, which expressly labelled the "reasonableness" factors "secondary rather than primary," stating that "[a] reviewing court must first examine the defendant's contacts with the forum. If the same do not exist in sufficient abundance, that is, if the *constitutionally necessary first-tier minimum is lacking the inquiry ends.*" *Donatelli v. National Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990) (emphasis added). *Accord McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 817 & n.10 (9th Cir. 1988); *Chung v. NANA Dev. Corp.*, 783 F.2d 1124, 1126-27 (4th Cir.), *cert. denied*, 479 U.S. 948 (1986); *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 271-72 & n.1, 736 P.2d 2, 5-6 & n.1 (1987) ("Because we find that Tennessee Farmers has not purposefully engaged in forum activities . . . we do not address [the] additional factors."); *Felix v. Bomoro Kommanditgesellschaft*, 196 Cal. App. 3d 106, 117, 241 Cal. Rptr. 670, 676

ever, even in the absence of minimum contacts, consider second-branch factors because of *Asahi*.[27] Still others, finding support in the view of Justice Stevens that minimum contacts need not always be evaluated, base their decisions to dismiss exclusively on reasonableness factors.[28]

In upholding jurisdiction over nonresident defendants many lower courts consistent with *Burger King* discuss the

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(1987) ("Having determined that defendant's contacts with California are insufficient to justify jurisdiction, we need not undertake the additional process of balancing the inconvenience of defending the action in this state against the interests of plaintiff in suing locally and of the state in assuming jurisdiction."); *Missouri ex rel. Wichita Falls Gen. Hosp. v. Adolf*, 728 S.W.2d 604, 609 (Ct. App. Mo.) ("We do not find that sufficient minimum contacts are present here to require exploration of additional factors."), *cert. denied*, 484 U.S. 927 (1987).

27 *See, e.g., Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990) (expressly interpreting *Asahi* as mandating analysis of the "reasonableness" factors even in the absence of minimum contacts); *Dalton v. R&W Marine, Inc.*, 897 F.2d 1359, 1361-63 (5th Cir. 1990); *U.S.S. Yachts, Inc. v. Ocean Yachts, Inc.*, 894 F.2d 9, 11-13 (1st Cir. 1990); *Lak, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1303-05 (6th Cir. 1989), *cert. denied*, _____ U.S. _____, 110 S. Ct. 1525 (1990); *Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654, 661 (4th Cir. 1989); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987); *Wells Am. Corp. v. Sunshine Elecs.*, 717 F. Supp. 1121, 1124, 1128-29 (D.S.C. 1989); *Blue Ball Properties, Inc. v. McClain*, 658 F. Supp. 1310, 1320-21 (D. Del. 1987); *Camelback Ski Corp. v. Behning*, 312 Md. 330, 336 & n.3, 539 A.2d 1107, 1110 & n.3 (1988), *aff'g on rehearing*, 307 Md. 270, 513 A.2d 874 (1986), *vacated*, 480 U.S. 901 (1987) (for reconsideration in light of *Asahi*).

28 The Ninth Circuit has actively espoused this view. *See, e.g., Federal Deposit Ins. Corp. v. British-Am. Ins. Co.*, 828 F.2d 1439, 1442 (9th Cir. 1987) ("Because we find that the exercise of personal jurisdiction . . . is *unreasonable*, we need not determine whether [the minimum contacts branch] of the test [is] satisfied."); *Fields v. Sedwick Associated Risks, Ltd.*, 796 F.2d 299, 302 (9th Cir. 1986) ("Because we find that the defendants have presented 'a compelling case that jurisdiction would be unreasonable,' we need not address the [the minimum contacts branch] of the test."). *See also The Supreme Court, 1986 Term—Leading Cases*, 101 Harv. L. Rev. 119, 266 (1987) ("The uncertainties involved in deciding whether minimum contacts exist probably will lead courts to avoid the issue whenever they can rule out jurisdiction on the ground of unreasonableness.").

second branch-factors only after finding purposefully established minimum contacts.[29] Other courts, however, uphold jurisdiction on minimum contacts alone without any consideration of second-branch factors.[30]

Moreover, the Ninth Circuit has suggested in *dicta* that "there will be cases in which the defendant has *not* purposefully directed its activities at the forum state, but has created sufficient contact to allow the state to exercise personal jurisdiction if such exercise is sufficiently reasonable." *Brand v. Menlove Dodge*, 796 F.2d 1070, 1074 (9th Cir. 1986) (emphasis added). *Accord Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986).[31]

The confusion in the lower courts generated by *Asahi*, is in part attributable to the three members of this Court who after finding no minimum contacts in *Asahi*, nevertheless,

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29 *See, e.g., Creeh v. Roberts*, 908 F.2d 75 (6th Cir. 1990); *Gulf Consol. Servs., Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071, 1074-75 (5th Cir. 1990); *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 701-02 (3d Cir. 1990); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 386 (9th Cir. 1990); *Williams Elec. Co. v. Honeywell, Inc.*, 847 F.2d 741, 743-44 (11th Cir. 1988); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169-70 (6th Cir. 1988); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529-30 (4th Cir. 1987); *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 666 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987); *Mickleburgh Mach. Co. v. Pacific Economic Dev. Co.*, 738 F. Supp. 159, 163 (E.D. Pa. 1990); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 326-30, 558 A.2d 1252, 1257-58 (1989); *Northern Aircraft, Inc. v. Reed*, 572 A.2d 1382, 1386 (Vt. 1990).

30 *See, e.g., English & Smith v. Metzger*, 901 F.2d 36, 39-40 (4th Cir. 1990); *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 690-91 (3d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3054 (U.S., June 29, 1990) (No. 90-33); *FMC Corp. v. Varonos*, 892 F.2d 1308, 1313-14 (7th Cir. 1990); *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382, 388-89 (11th Cir. 1989).

31 Some courts find that reasonableness factors such as convenience and forum state interest, "while . . . worthy of serious consideration, *cannot alone serve as the foundation for assumption of jurisdiction.*" *Camelback Ski Corp. v. Behning*, 307 Md. 270, 286, 513 A.2d 874, 882 (1986) (emphasis added) (citations omitted), *vacated*, 480 U.S. 901 (1987) (for reconsideration in light of *Asahi*), *aff'd on rehearing*, 312 Md. 330, 539 A.2d 1107 (1988).

went on to evaluate the reasonableness factors. The only reason to consider the second branch in these circumstances is if reasonableness can independently confer jurisdiction in the absence of minimum contacts. If so, then the entire relevance of traditional minimum contacts, which this Court has repeatedly called the "constitutional touchstone," is cast into serious doubt.

In the case below, Kramer had no meaningful "contacts, ties or relations" in or with South Carolina. Without making a specific finding that he purposefully directed activities at South Carolina in a manner sufficient either to invoke the benefits and protections of South Carolina law, or to reasonably anticipate litigation in South Carolina (Reason III for Granting the Writ), the South Carolina Supreme Court, nevertheless, "conclude[d] that conferring jurisdiction upon this state would pose no unusual inconvenience since all parties to the suit *except Kramer* are South Carolina residents." (388 S.E.2d at 799, App., at 5a.) (emphasis added).

By justifying jurisdiction on a mix of reasonableness and contact analysis, without independently finding sufficient "minimum contacts" to support jurisdiction, the South Carolina court stretched the due process clause beyond acceptable limits, and vividly illustrated the confusion caused by *Asahi*.[32] The conflicts among the lower courts on whether the reasonableness factors may be considered without first finding minimum contacts requires definitive resolution by this Court.

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32 The South Carolina due process test, which combines minimum contacts and reasonableness factors (*see* p. 6 *supra*) is likely to achieve this result often. Other courts also use due process tests that mix the two branches. *See, e.g., Caluri v. Rypkema*, 570 A.2d 830, 831 (Me. 1990); *Brown County Family Serv. Center v. Kahoun*, 427 N.W.2d 20, 22 (Ct. App. Minn. 1988); *ETR Corp. v. Wilson Welding Serv., Inc.*, 96 N.C. App. 666, 386 S.E.2d 766, 768 (1990); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990); *Boyd Nursery Co. v. Hill*, No. 01-A-01-95005-CH00170 (Ct. App. Tenn., Aug. 24, 1990) (1990 West Law 121571, at 5-6).

III.

THE SOUTH CAROLINA COURT'S DECISION CONFLICTS WITH THE HOLDINGS OF THIS COURT ON THE REQUIREMENTS FOR MINIMUM CONTACTS

Apart from citing two of this Court's decisions for general principles,[33] the minimum contacts analysis of the South Carolina Supreme Court is contained in seven operative sentences, which, rearranged to assist analysis, state:

(1) "The *pleadings allege* that Hammond was the object of the tortious conduct which resulted in financial benefit for Kramer, to Hammond's detriment."

(2) "The *record* in this case shows that the transaction in which Kramer participated involving South Carolina parties lasted for several months."

(3) "There is evidence in *the record* indicating that Kramer participated extensively from the initial meeting between Hammond and the California Group."

(4) "Kramer met with investors, negotiated with Evins and Case, and eventually became a principal officer and stockholder in Medstone."

(5) "Hammond was a major investor and would have been a necessary party to ongoing business transactions involving Kramer.

(6) "Further, we note from *the record* that the corporate by-laws of HTI state that Spartanburg, South Carolina, was to be the principal place of business and also that Spartanburg was listed on the corporate stationary."

(7) "Finally, *this record* contains written correspondence and evidence of telecommunications which, with

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33 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

> other evidence, is sufficient to overcome a motion to dismiss under Rule 12(b)(2)."

(388 S.E.2d at 799, App., at 5a-6a.) (emphasis added)

The South Carolina court relied on its own due process test originally articulated in 1960,[34] and not reformulated to reflect this Court's many intervening decisions, in finding the above facts sufficient to uphold jurisdiction over Kramer. Indeed, the opinion below was written as if this Court had never decided *Hanson v. Denckla*, 357 U.S. 235 (1958), which made "purposeful availment" the critical element of jurisdictional due process.[35] In *Hanson* this Court stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of defendant's activity, *but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.*

Id. at 253 (emphasis added). This oft-quoted reasoning of *Hanson* has recently been reaffirmed. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985). The court below also failed to consider *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), which added another crucial element to the analysis: "[T]he foreseeability that is criti-

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34 *See* page 6 *supra*. The first three considerations were originally articulated in *Boney v. Trans-State Dredging Co.*, 237 S.C. 54, 62, 115 S.E.2d 508, 512 (1960), more than thirty years ago. The final consideration was added by *Parker v. Williams & Madjanik, Inc.*, 270 S.C. 570, 576, 243 S.E.2d 451, 455 (1978), more than twelve years ago.

35 *See, e.g.*, Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. Rev. 407, 408-09, 412-13, 421-23 (1980); Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in Burger King Corp. v. Rudzewicz*, 1986 Ariz. St. L.J. 585, 597-99.

cal to the due process analysis is . . . that the defendant's conduct and connection with the forum state are such that he should *reasonable anticipate being haled into court there.*" *Id.* at 297 (emphasis added) (citations omitted).

The facts relied on by the court below, including the amount of time the transaction lasted, Kramer's participation at the meetings between Hammond and the California Group (in California), Kramer's negotiation with "investors" (in Illinois and Indiana), Kramer's negotiations with Evins and Case (in California, New York and by phone), Hammond's status as a major investor and Kramer's becoming a principal officer of Medstone (after the events complained of when Medstone's principal place of business was in California), do not in any way establish that Kramer "deliberately" engaged in significant activities in or with South Carolina establishing a "substantial connection" by which he "purposefully availed" himself of the benefits and protections of South Carolina law. Neither do they show that Kramer should have reasonably anticipated being haled into a South Carolina court on a claim arising out of a business transaction centered outside of South Carolina, in which the transaction participants carefully avoided application of South Carolina law at every turn.

Not only do the statements of the South Carolina court fail to show purposeful availment or reasonable anticipation of forum state litigation, but the record before that court plainly established that Hammond had reached outside South Carolina to involve himself in the California Group's invention[36] and that the resulting business transaction was centered entirely outside of South Carolina. Consequently, Kramer did not have "fair warning" that he would be required to defend

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36 *See, e.g., Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 283 (7th Cir. 1990) ("One relevant inquiry is which party initiated the business transaction."). *Accord English & Smith v. Metzger*, 901 F.2d 36, 39 (4th Cir. 1990).

claims in South Carolina's courts.[37] The inventors were Californians and Hammond reached out to them in Colorado and California. The proposed corporation that resulted was chartered in Delaware. Principal efforts to sell a prototype of the invention to initially fund the corporation were made in Indiana and with Michael Reese in Illinois. Hammond sought the letter of credit essential to the Michael Reese sale in Alabama. Every meeting of the transaction participants occurred outside of South Carolina—*i.e.*, in California, New York, Indiana and Illinois. Moreover, each crucial agreement memorializing the underlying transaction choose governing law of states other than South Carolina. *See* page 4 *supra*.[38] All of these facts controverting jurisdiction in South Carolina were established by the discovery record and are undisputed. Yet the Court below ignored them because it applied the ineffectual *prima facie* standard to Kramer's 12(b)(2) motion. (*See* Reason I for Granting the Writ)

The only activity connecting Kramer to South Carolina was written correspondence and telecommunications. Kramer sent

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37 This Court has explained the crucial significance of the "purposeful availment" doctrine as follows:

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum state.

Burger King, 471 U.S. at 475 (citations and footnotes omitted) (emphasis in original text). Although the South Carolina Supreme Court's opinion partially cites these elements, it, nevertheless, failed to mention "unilateral activity of another party or a third person," which has crucial implications in this case. (388 S.E.2d at 799, App., at 6a). The unilateral decision of Hammond to reach out to California and enter into a business transaction with the California Group is the only reason Kramer had any contact with a South Carolina resident.

38 In addition, the record establishes Kramer had no traditional physical contact with South Carolina. He is neither licensed to practice law there nor has he ever solicited clients there. He owns no property there. He has no bank accounts there. He has no business interests there. He has not once set foot in South Carolina. (Kramer Aff. ¶ 18, R. 1045)

drafts of documents and made and received telephone calls from South Carolina during negotiation of the underlying business transaction. But these communications were exclusively with Hammond's counsel, even though Hammond participated in a few telephone conferences. They resulted from Kramer's fulfilling his engagement to his California clients. Moreover, there is not a scintilla of evidence in the extensive record below showing that Kramer committed any wrongdoing or any of the misconduct Hammond alleges during any of these communications, or by any other conduct. Accordingly, Hammond cannot show that his claims arise out of any forum state contact by Kramer, a necessary element for specific jurisdiction under the due process clause.[39]

In upholding jurisdiction over Kramer, the court below also relied on the corporate by-laws of the then newly chartered Delaware corporation, which state that the "principal office shall be located in or near . . . Spartanburg." (R. 1103) Had the lower court imposed the "preponderance" standard (Reason I for Granting the Writ) to Kramer's 12(b)(2) motion, evidence in the record demonstrating the jurisdictional irrelevance of the by-laws would have been considered. Imposition of the lower *prima facie* standard allowed the court below to ignore at least three matters established by the record demonstrating the immateriality of the by-laws. First, the by-laws were boilerplate by-laws of the Butler, Means firm. Second, at that time, the company, albeit incorporated, had no shareholders, no capital and no business. Third, and most significantly, the Hammond-Wallace agreement, dated November 6, 1984, and executed by Hammond fifteen days after the by-laws were adopted, recites that "the location for manufacturing of the . . . machines and the site for the location of the principal office of [the company] has

39 A state exercises specific jurisdiction only over claims arising out of a defendant's contacts with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984).

not yet been determined." (R. 422)[40] Eventually the company's principal office and manufacturing facilities were located in California.

When applied to *Hanson*'s "purposeful availment" and *World-Wide Volkswagen*'s "reasonable anticipation" doctrines, the collective irrelevance of the facts relied on by the court below is obvious, and the collective significance of the record "facts" ignored by the court is apparent. The South Carolina Supreme Court's opinion is wrong, and when the entire discovery record, including evidence controverting jurisdiction, is tested under the due process analysis articulated by this Court, the result is wrong as well.

Borrowing Winston Churchill's description of Russia in the 1930's, the First Circuit recently described "the doctrinal vagaries of the concept of personal jurisdiction," as a "riddle wrapped in a mystery inside an enigma."[41] By granting the writ and resolving the issues presented, this Court has an opportunity to solve the "riddle," unwrap the "mystery," and explain the "enigma."

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40 The South Carolina court's reliance on the listing of Spartanburg on the corporate stationery of Medstone is even less significant. The record contains a letter on Medstone, International, Inc. stationery, dated June 10, 1985, which was long after the events raised in Hammond's complaint. (R. 965) Although the court correctly noted that Spartanburg was listed, it failed to note that New York, New York, Irvine, California and Richmond, Virginia were also listed as office locations of Medstone. (R. 965).

41 *Donatelli v. National Hockey League*, 893 F.2d 459, 462 (1st Cir. 1990).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 7, 1990

APPENDIX

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

GAINES W. HAMMOND, JR.,

Respondent,

—v.—

BUTLER, MEANS, EVINS & BROWN, THOMAS A. EVINS, STANLEY T. CASE and ALAN S. KRAMER,

Defendants,

of whom ALAN S. KRAMER is

Appellant.

APPEAL FROM SPARTANBURG COUNTY
WILLIAM H. BALLENGER, JUDGE

Opinion No. 23142

Heard February 21, 1989—Filed January 22, 1990

AFFIRMED

J. D. TODD, JR., and O. DOYLE MARTIN, both of Leatherwood, Walker, Todd & Mann, of Greenville, *for appellant*.

A. CAMDEN LEWIS and MARY G. LEWIS, both of Lewis, Babcock, Pleicones & Hawkins, of Columbia, *for respondent*.

FINNEY, A.J.: This appeal involves the question of whether a South Carolina court may exercise personal juris-

diction over a nonresident, appellant Alan S. Kramer (Kramer), who resides and practices law in New York City. Kramer moved to dismiss the action against him for lack of personal jurisdiction. The trial court held that the long-arm statute and minimum contact requirements had been satisfied; therefore, South Carolina could exercise personal jurisdiction. We affirm the trial court's decision.

Respondent Gaines W. Hammond, Jr. (Hammond), is a businessman-urologist who practices in South Carolina. Until late 1984, he was represented in the business transaction which led to this lawsuit by defendants Stanley T. Case (Case) and Thomas A. Evins (Evins), partners in the South Carolina law firm of Butler, Means, Evins & Brown (Butler Firm). Kramer represented three Californians (California Group) who invented a non-surgical medical technology for treatment of kidney stones.

In July 1984, Hammond talked with one of the inventors about acquisition of rights to this new technology. In August 1984, Hammond decided to try to obtain a license from the California Group, and a meeting was held in California. At this meeting, Kramer represented the California Group, and Hammond was represented by Evins and Case.

Subsequently Hammond paid the California Group $50,000 for an option to acquire the right to license the technology for $1,000,000. The option was due to expire October 22, 1984, but could be extended until November 8, 1984, for an additional $25,000. The designated licensee was a newly-formed Delaware corporation, Hammond Technologies, Inc. (HTI).

Hammond was not successful in finding a purchaser for a prototype of the machine by the end of the first option period, so he paid the additional fee to extend the option. Michael Reese Hospital in Chicago, the principal prospect, agreed to the purchase on certain conditions, one of which was a letter of credit for $400,000.

Hammond entered into a contract with Dr. Gerald Wallace of Mobile, Alabama, to secure the letter of credit. Wallace specified prerequisites to providing the letter of credit, and the California Group required modifications of the

Hammond-Wallace contract. The transactions among the parties were not finalized by November 8, 1984, and the option expired.

By November 14, 1984, HTI had undergone organizational changes which included a name-change to Medstone International, Inc. (Medstone), and amendment of the subscription agreement that was executed by all parties. Thereafter the California Group granted the license to Medstone, which completed the transaction with Michael Reese Hospital. The stock ownership of Medstone always has been the principal issue in this controversy. Initially, terms concerning stock ownership were reflected in a subscription agreement dated in September 1984 which allocated 70,000 out of 100,000 shares of the company to Hammond. Hammond alleges that as a result of modification of the subscription, he was allocated only 10,000 shares. Kramer became president of the company, and Hammond became one of the vice presidents. They worked together as officers and directors until July 1985, when Hammond ceased active participation in Medstone.

Hammond filed suit against the Butler Firm, Kramer, Evins and Case in March of 1986. Hammond's complaint alleged conspiracy, fraud and deceit, breach of fiduciary duty, negligence, slander, and violation of the South Carolina Unfair Trade Practices Act.

Hammond claims that from August through November 14, 1984, Kramer and Evins conspired to prevent him from obtaining a controlling share of Hammond Technologies, Inc. (now Medstone International, Inc.). Further, Hammond alleges that Kramer and the Butler Firm conspired to defraud him of Medstone stock through delay and misrepresentation, resulting in the drastic reduction of Hammond's shares while Kramer's shares increased in number.

On the basis that he had absolutely no contact with or activities in South Carolina, Kramer moved to dismiss the complaint against him for lack of personal jurisdiction. The trial court denied the motion. Kramer appeals.

Notwithstanding the fact that at trial the burden of establishing jurisdiction is upon the party seeking to invoke the

jurisdiction of the courts of this state against a nonresident by utilization of our long-arm statute, *Yarborough and Company v. Schoolfield Furniture Industries, Inc.*, 275 S.C. 151, 268 S.E.2d 42 (1980), at the pre-trial stage of the proceedings, the plaintiff need only make a prima facie showing by pleadings and affidavits. *Askins v. Firedoor Corporation of Florida*, 281 S.C. 611, 316 S.E.2d 713 (Ct. App. 1984); *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976).

There is a two-step approach to determining whether our courts may exercise personal jurisdiction over a nonresident. The first step is whether the nonresident's conduct meets the requirements of South Carolina's long-arm statute; and second whether, under the particular circumstances, a finding of minimum contacts comports with "traditional notions of fair play and substantial justice." *Hume v. Durwood Medical Clinic, Inc.*, 282 S.C. 236, 318 S.E.2d 119, *cert. granted*, 327 S.E.2d 32, *cert. dismissed*, 329 S.E.2d 443 (1984), (quoting *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed 95 (1945)).

South Carolina's long-arm statute, S.C. Code Ann. Section 36-2-803 (1976), reads in pertinent part:

> (1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's
>
> (a) transacting any business in this State;
>
> . . .
>
> (c) commission of a tortious act in whole or in part in this State;
>
> . . .

In certain instances, an out-of-state defendant may be subject to jurisdiction under a long-arm statute on the theory that his co-conspirator conducted activities in a particular state pursuant to the conspiracy. *Ghazoul v. International Management Services, Inc.*, 398 F. Supp. 307 (S.D.N.Y. 1975). A civil conspiracy consists of three elements: (1) A combination of two or more persons, (2) for the purpose of

injuring the plaintiff, (3) which causes the plaintiff special damages.

The respondent alleges that Kramer, the Butler Firm, Evins and Case conspired to defraud him, that the plan was carried out by delay and misrepresentation, and that as a result of this alleged conspiracy, he has been injured.

We find that the allegations contained in Hammond's pleadings and affidavits are sufficient to invoke the long-arm statute under the provisions of § 36-2-803(1)(C).

The second step in determining jurisdiction is whether a nonresident defendant has established minimum contacts which meet the due process requirement. *International Shoe Co. v. State of Washington, supra.* This test requires that the state's exercise of jurisdiction not offend traditional notions of fair play and substantial justice, and is based on four considerations:

1. The duration of the activity of the non-resident within the state;
2. The character and circumstances of the commission of the non-resident's act;
3. The inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the non-resident; and
4. The state's interest in exercising jurisdiction.

Colite Industries v. G. W. Murphy Const., 297 S.C. 426, 377 S.E.2d 321 (1989).

The record in this case shows that the transaction in which Kramer participated involving South Carolina parties lasted for several months. The pleadings allege that Hammond was the object of the tortious conduct which resulted in a financial benefit for Kramer, to Hammond's detriment. Finally, we conclude that conferring jurisdiction upon this state would pose no unusual inconvenience since all parties to the suit except Kramer are South Carolina residents.

Moreover, jurisdiction may not be avoided merely because the defendant did not physically enter South Carolina. The constitutional touchstone remains whether the defendant pur-

posely established minimum contacts in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985). This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or attenuated" contacts. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d. 790 (1984).

There is evidence in the record indicating that Kramer participated extensively from the initial meeting between Hammond and the California Group. Kramer met with investors, negotiated with Evins and Case, and eventually became a principal officer and stockholder in Medstone. Hammond was a major investor and would have been a necessary party to ongoing business transactions involving Kramer. Further, we note from the record that the corporate by-laws of HTI state that Spartanburg, South Carolina, was to be the principal place of business and also that Spartanburg was listed on the corporate stationery.

Finally, this record contains written correspondence and evidence of telecommunications which, with other evidence, is sufficient to overcome a motion to dismiss under Rule 12(b)(2). *See Kimball v. Schwartz*, 580 F. Supp. 582 (W.D. Pa. 1984); *Sterling Indus. Corp. v. Telephone, Inc.*, 484 F. Supp. 1294 (D.C. Mich. 1980).[1]

We affirm the decision of the trial court denying appellant's 12(b)(2) motion challenging jurisdiction of the South Carolina courts.

AFFIRMED.

GREGORY, C.J., HARWELL, CHANDLER and TOAL, JJ., concur.

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1 Our conclusion in this case is consistent with the Court of Appeals' decision in *Allen v. Columbia Financial Management Ltd.*, 297 S.C. 481, 377 S.E.2d 352 (Ct. App. 1988).

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Filed August 11, 1987

COURT OF COMMON PLEAS
86-CP-42-574

GAINES W. HAMMOND, JR.,

Plaintiff,

—versus—

BUTLER, MEANS, EVINS AND BROWNE; THOMAS A. EVINS, STANLEY T. CASE, and ALAN S. KRAMER,

Defendants.

ORDER

This matter came before me for hearing on May 26, 1987 pursuant to a Motion to Dismiss Defendant Alan S. Kramer from this action. Present at the hearing were attorneys for all parties.

At the pretrial stage, a plaintiff need only make a *prima facie* showing that the trial court should exercise *in personam* jurisdiction over the defendant. After hearing arguments of counsel and after a thorough review of the extensive record in this matter, including Plaintiff's pleadings and affidavits, I find that Plaintiff has met that burden and that the Motion to Dismiss should be denied.

This is an action based upon malpractice, breach of fiduciary duty, breach of contract, negligence, fraud and conspiracy. Although contact with South Carolina may not have been extensive, there is sufficient evidence to show that there

was contact with this State and that Defendant Alan S. Kramer was significantly involved in the developments concerning this medical technology. I find that there was contact by telephone and by other means of correspondence, as well as an intention to place one of the first machines in South Carolina. In addition, Defendant Kramer was President of Hammond Technologies, Inc., later known as Medstone, which had its principal place of business in South Carolina and which was formed to commercialize this technology. Kramer negotiated the placement of the machine and represented the company in other legal and business matters.

In light of these findings, I conclude that the Court should maintain personal jurisdiction over Defendant Alan S. Kramer and that doing so conforms with the requirements of the Long Arm Statute and does not offend "traditional notions of fair play and substantial justice."

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss Defendant Alan S. Kramer is denied.

AND IT IS SO ORDERED.

s/ WILLIAM H. BALLENGER
William H. Ballenger
JUDGE, TENTH JUDICIAL CIRCUIT

Walhalla, South Carolina

August 8th, 1987

[LETTERHEAD OF THE SUPREME COURT
OF SOUTH CAROLINA]

June 11, 1990

O. Doyle Martin, Esquire
100 East Coffee Street
P. O. Box 87
Greenville, S. C. 29602-0087

Re: Gaines W. Hammond, Jr. v. Butler, Means, Evins and Browne, Thomas A. Evins, Stanley T. Case, and Alan S. Kramer

Dear Mr. Martin:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
Denied.

s/ GEORGE T. GREGORY, JR. C.J.

s/ DAVID W. HARWELL A.J.

s/ A. LEE CHANDLER A.J.

s/ ERNEST A. FINNEY, JR. A.J.

s/ JEAN H. TOAL A.J.

June 11, 1990."

The remittitur in this matter is today being forwarded to the Clerk of Court for Spartanburg County.

We have received a letter withdrawing the Motion for Partial Remand in this matter. This letter is to advise that there will be no action taken on this Motion.

By copy of this letter, we are advising that there will be no action taken on the Motion to Strike in this matter since the Petition for Rehearing has been denied.

Sincerely yours,

s/ CLYDE N. DAVIS, JR.
CLERK

CND,Jr./dmh

cc: A. Camden Lewis, Esquire
Mary G. Lewis, Esquire

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

(a) When Presented. A defendant shall serve his answer within 30 days after the service of the complaint upon him, unless the Court directs otherwise when service of process is made pursuant to Rule 4(e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 30 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the Court: (1) if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action; (2) if the Court grants a motion for a more definite statement the responsive pleading shall be served within 15 days after the service of the more definite statement, and a responsive pleading, if necessary, shall be served within 15 days after notice of the court's action on a motion to strike.

(b) How Presented. Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or

more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a cause of action or defense to which an adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that cause of action or defense. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings ae presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(8) in subdivision (b) of this rule, whether made in a pleading or by motion, motions for judgment on the pleadings under subdivision (c) of this rule, and motions for summary judgment under Rule 56, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the

Court is not obeyed within 15 days after notice of the order or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a cause of action upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

[Amended effective May 1, 1986.]

Notes

This Rule 12(a) is identical to the Federal Rule except that it changes the time to answer from 20 to 30 days, and the time to plead after motion denied from 10 to 15 days. No other changes in State practice are affected by the Rule.

This important Rule 12(b) enables a party to: (1) raise by motion or answer all of the defenses now raised by demurrer, and (2) eliminates the necessity of the awkward "special appearance to object to jurisdiction" under present State practice. The motion should be made before answer for early disposition of cases; but the defenses enumerated may be made in the responsive pleading and are not waived by being stated in a pleading rather than by motion. The last sentence eliminates the so-called "speaking demurrer" at trial, by treating such late motion as a motion for Summary Judgment under Rule 56.

This Rule 12(c) preserves the present common law practice in this State; and it is more important than the Federal Rule, because of the requirement for fact pleading. It may also be treated as a motion for summary judgment in proper circumstances.

This Rule 12(d) is the same as the Federal Rule, and assures timely disposal of 12(b) and 12(c) motions to dismiss or for judgment prior to trial.

This Rule 12(e) is the same as the Federal Rule and effects no change in present practice, except time for compliance is changed from 10 days to 15 days.

This Rule 12(f) preserves present State practice under Code § 15-13-60 and § 15-13-440 verbatim.

This Rule 12(g) is the same as the Federal Rule. It is new material to help prevent piecemeal presentation of defenses by separate motions.

This Rule 12(h) should be read together with Rule 12(g) in defining those defenses which are waived if not presented by pleading or motion.

Notes to 1986 Amendments

The amendment to Rule 12(a)(2) sets the time for response after a motion to strike at 15 days, which is the same time set for pleading after a successful motion for a more definite statement.

The amendment to the fourth sentence of Rule 12(b) clarifies the litigant's right to assert at trial any defenses as well as any claims he could have raised in a permissive pleading but chose not to do so. Consequently, the election not to reply to an affirmative defense does not waive the right to contest that affirmative defense.

The amendment to Rule 12(f) makes clear that a motion to strike must point out the defects complained of, and is consistent with the language of Rule 12(e).

§ 36-2-803. Personal jurisdiction based upon conduct.

(1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's

(a) transacting any business in this State;

(b) contracting to supply services or things in the State;

(c) commission of a tortious act in whole or in part in this State;

(d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State; or

(e) having an interest in, using, or possessing real property in this State; or

(f) contracting to insure any person, property or risk located within this State at the time of contracting; or

(g) entry into a contract to be performed in whole or in part by either party in this State; or

(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State, shall not be subject to the provisions of § 15-7-100(3).

No. 90-417

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1990

ALAN S. KRAMER,

Petitioner,

-- vs. --

GAINES W. HAMMOND, JR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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RESTATED QUESTIONS PRESENTED

When a New York lawyer, who worked with and through South Carolina lawyers to defraud and conspire against a South Carolina resident, is sued in South Carolina:

I. Is personal jurisdiction constitutionally proper over the New York lawyer when both the minimum contacts and reasonableness criteria are satisfied?

II. Is personal jurisdiction appropriate in a state court proceeding where the court denies a motion to dismiss based upon its application of a *prima facie* standard to the facts supporting jurisdiction?

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STATEMENT OF THE CASE

Respondent, Gaines W. Hammond, Jr., is a urologist practicing in Spartanburg, South Carolina. In the summer of 1984, Dr. Hammond became interested in purchasing technology which he believed would allow for the successful development of a lithotripter, a machine which allows for the noninvasive treatment of kidney stones. Dr. Hammond hired the South Carolina law firm of Butler, Means, Evins & Browne to set up a corporation to receive the lithotripter technology. Dr. Hammond purchased an option to acquire the technology from its inventors, Erroll Payne, Richard Penfil and Charles McGregor (the "California Group") for $50,000, with a payment of $1,100,000 to be made to the California Group by October 22, 1984, the end of the option period. Dr. Hammond and the California Group reached an agreement whereby he would own 70% of the company, and the California Group would own 25%. The remaining 5% was assigned to another individual whose involvement is not material to this action. (R. 391).[1]

The legal aspects of the project were undertaken by two members of the South Carolina firm, Thomas A. Evins and Stanley T. Case, and by Petitioner Alan S. Kramer in New York,[2] who kept in close contact with the

---

[1] References are to the Transcript of Record before the South Carolina Supreme Court.

[2] Kramer, Evins and Case all have various views of who was representing whom in this project. Evins and Case were representing themselves as subscribers to the stock of the corporation, Dr. Hammond (R. 531), Hammond Technologies,

(Continued on following page)

South Carolina lawyers. (R. 20, 25, 32, 34, 82-89, 91-101, 123, 536). After returning from a meeting in California, Evins and Kramer drafted a subscription agreement (Subscription Agreement No. 1) which shows that Dr. Hammond was to receive seventy percentage points of the company, Hammond Technologies, Inc. (HTI) (R. 25, 82-89).

Kramer, Evins and Case then entered into an agreement of their own and prepared another subscription agreement (Subscription Agreement No. 2) which provided for a very different division of ownership of HTI than the one Dr. Hammond reached with the California Group. Specifically, Dr. Hammond's ownership interest was reduced to 35 points or 35,000 shares. Evins and Case took 6 1/2 points or 6,500 shares for themselves. Kramer also took 6 1/2 points or 6,500 shares. The California Group's subscription remained at 25 points or 25,000 shares. (R. 91-92).

After a meeting in New York (R. 40, 136, 140) and numerous telephone conversations between Kramer and the lawyers in South Carolina (R. 27, 30, 73-74, 140-141), Kramer, Evins and Case set out to formalize their rights

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(Continued from previous page)

Inc., which later became known as Medstone (R. 438), and Erroll Payne. (R. 546). Kramer was representing himself (R. 150), Dr. Hammond (R. 523, 527, 804), all of the subscribers to the corporation including the California Group, Evins, Case, and Dr. Wallace. (R. 20, 147, 1052). Contrary to the implication of Kramer, there is significant evidence that *Kramer represented Hammond*. (R. 523, 527, 804).

to the stock of Dr. Hammond's company. They accomplished this by lying to Dr. Hammond about the lawyers' participation and its effect on Dr. Hammond's control of HTI (R. 5, 447, 603, 1052).

Upon presentation of Subscription Agreement No. 2, which Kramer sent to Dr. Hammond in South Carolina, Evins represented to him that the California Group insisted upon the allocation of a total of 13 points to the attorneys and that the deal would not be accepted by the California Group unless Dr. Hammond signed the new agreement. (R. 394, 603). Dr. Hammond later discovered that the California Group had *not* insisted on the lawyers' participation in the ownership of the company. In fact, one of the inventors, who was apparently also misled, called Dr. Hammond wanting to know why *Dr. Hammond* had done this. (R. 405-406).

Kramer wanted to be involved in Dr. Hammond's company and he wanted shares. Kramer got his shares and Evins and Case took some for themselves as well. Kramer testified:

> Q. How did it come up about Mr. Evins getting six to seven percent?
>
> A. Tom Evins told me they would subscribe to the same number that I would subscribe to.

(R. 136).

Evins, on the other hand, testified at his deposition that the lawyers' participation was Kramer's idea:

> Q. Who brought up that you should get 6,500 shares?
>
> A. I don't know specifically. Mr. Kramer, I think.

(R. 504).

Q. So, when you went to New York who is the one that came up with the idea that you would get 6,500 shares?

A. The best of my recollection it was Mr. Kramer.

(R. 509).

Evins' deposition testimony confirmed Kramer's role in their agreement to take shares away from Dr. Hammond:

Q. Did Mr. Kramer then insist that he get a portion of Dr. Hammond's 70,000 shares?

A. He suggested that this would be in the best interest of the project.

Q. And he suggested that you get 6,500 shares of Dr. Hammond's shares; is that correct?

A. I don't think you could call them exactly Dr. Hammond's shares, but that general allocation, anymore than the 15,000 set aside for capital acquisition.

Q. And you agreed to that?

A. Yes.

(R. 511).

It is difficult to see how it was in the best interest of anyone but the lawyers to reallocate Dr. Hammond's shares to Kramer and Evins, who was already charging an hourly rate of $125 per hour. (R. 492).

In an effort to comply with the terms of his Option Agreement, Dr. Hammond negotiated an agreement between HTI and Michael Reese Hospital in Chicago,

Illinois. Under that agreement, Michael Reese Hospital would purchase the licensing rights to use one of the lithotriptor machines for the price of $1,200,000 and thereby permit Dr. Hammond to raise the capital required by his Option Agreement to purchase the license for the technology.

In accordance with the terms of the Option Agreement, and with the October 22nd Option deadline approaching, Dr. Hammond purchased an extension of the Option until 5:00 o'clock p.m. on November 8, 1984, for an additional $25,000.

The Michael Reese Hospital Agreement required, among other things, a $400,000 irrevocable letter of credit in its favor. As the $400,000 letter of credit was essential to consummation of the sale to Michael Reese Hospital, (R. 553) and thus essential to Dr. Hammond's exercise of his Option, Dr. Hammond entered into an agreement, dated November 6, 1984, with one Dr. Gerald Wallace to provide the letter of credit ("Wallace Agreement"). (R. 419).

The Wallace Agreement provided for the essential letter of credit and was otherwise favorable to Dr. Hammond and the California Group. (R. 419, 566). Furthermore, it would have allowed Dr. Hammond to comply with the terms of his Option Agreement, provide HTI with the licensing rights to the technology and maintain Dr. Hammond's control over 35% of HTI.

The lawyers were not satisfied with taking just 13,000 shares of Dr. Hammond's company and further reduced Dr. Hammond's share after allowing his option to expire. Evins increased his share to 7,500 shares and Kramer took

an additional 4,000 shares for a total of 10,500 shares. The lawyers took a total of 18,000 shares, and Dr. Hammond, the only one who had risked a dime on the project, was cut from 35,000 shares to 10,000 shares. (R. 103-110, 190-191).

Kramer said of the extra shares:

Q. Why do they give Mr. Evins 7,500 shares?

A. You will have to ask them.

Q. Didn't they tell you?

A. There were discussions back and forth as to what was fair to do under the circumstances.

* * *

Q. Mr. Kramer, when you talked to Mr. Evins, did you talk to Mr. Evins about his gaining 1500 shares in South Carolina?

A. There were discussions with me in New York, the California Group in California, Mr. Evins in South Carolina where there were discussions as to how the corporation would be capitalized under these new circumstances.

(R. 66).

Evins testified:

Q. So, when you got 7,500 shares in, I believe it was November of 1984, that was a total surprise to you.

A. It was.

Q. Did you then take those 7,500 shares?

A. I did.

Q. How many did Dr. Hammond have?

A. I don't know. At that time, I believe he had 10,000 shares if I'm not mistaken.

Q. Why didn't you give those shares to Dr. Hammond?

A. I could see no reason to give them to Dr. Hammond.

Q. Why not?

A. They were not his shares.

Q. Whose were they?

A They were allocated to me.

(R. 516).

To the detriment of Dr. Hammond, his lawyers refused to go forward with the closing by using the Wallace Agreement. Without reading one word of the Wallace Agreement, Evins criticized it, as well as Dr. Hammond, and ran to call Kramer. Dr. Hammond had managed to come up with the letter of credit, spoiling the plans of Evins and Kramer to take control of HTI. (R. 381, 382, 386). Kramer and Evins had been cooperating in trying to prevent Dr. Hammond from securing a letter of credit. Kramer told Dr. Hammond that it was not necessary for him to get a letter of credit at all and that everything was "in line". (R. 384, 457). Kramer told Dr. Hammond he didn't need to be in Alabama talking to Gerald Wallace because Evins had the necessary letter of credit already. (R. 383). Furious at Dr. Hammond for spoiling the lawyers' plans, Evins said that "the company was in his back pocket, that I'd [Dr. Hammond] never control any part of this company, never have anything to do with this company. . . . " (R. 382).

The lawyers, including Kramer, then began to intentionally prevent Dr. Hammond from being able to maintain his ownership percentage of HTI by allowing the November 8 option deadline to pass and by representing to Dr. Hammond that his option had expired and that he was out of HTI. (R. 409-410, 413). Because his signature and his letter of credit were needed to close the deal, and a urologist was needed to present the technology to the urological community, Dr. Hammond was kept in, but with the further reduction in his ownership of HTI to only 10,000 shares. (R. 443, 469, 576, 577, 625-626).

In the Michael Reese negotiations, Kramer had primary control over Dr. Hammond's interests. (R. 523, 628). If the Michael Reese deal did not close, Kramer's clients, the California Group, would be in complete control. If Kramer delayed, it helped his California clients; if Kramer proceeded, it helped his other client, Dr. Hammond. Kramer had a conflict of interest which resulted in substantial injury to Dr. Hammond. Aware of his conflict, Kramer continued to carry out his scheme (R. 149) and succeeded in preventing a completion of the letter of credit until the November 8 deadline had passed.

Mary Dempsey, an in-house attorney at Michael Reese, testified that she knew of no urgency nor any reason that the deal could not have closed by November 8, 1984. (R. 634, 667-668). She testified that the material terms of the contract were finalized prior to November 5. (R. 657-658, 676, 988-1025). Unfortunately for Dr. Hammond, Kramer delayed the closing until after the November 8 deadline by insisting on last minute changes to the Michael Reese Agreement. (R. 377, 828). Kramer kept making changes in its terms or conditions (R. 629-630,

632, 635, 644-645, 657-659) and even tried to renege on part of the deal, causing further delay. (R. 665-666). There was no reason why the closing could not have taken place prior to expiration of Dr. Hammond's option. (R. 662, 667, 874). But for the active interference of Kramer it would have.

Kramer and Evins then wasted no time in proceeding to consolidate their control of HTI on November 10. Evins received in South Carolina a new subscription agreement prepared by Kramer. (R. 68-69). This demonstrates that Kramer and Evins intended to let the deadline pass, and they were already drafting the new division of ownership, which further increased their shares and further decreased Dr. Hammond's shares. (R. 190-191).

Indeed, the deal with Michael Reese did close by telephone on November 13, 1984,[3] The structure of the project was accomplished with the same "Hammond Technologies, Inc." and the same "Dr. Wallace's Letter of Credit" that Dr. Hammond had obtained. (R. 52). The only one who lost was Dr. Hammond. *All of the lawyers profited.* (R. 63-66, 516).

This lawsuit is based on the fact that Kramer, Evins, and Case orchestrated a series of transactions which consistently reduced Dr. Hammond's share of his company and caused his option to purchase the lithotriptor technology to expire. Kramer assumed responsibility for negotiating the critical contract with Michael Reese Hospital. (R. 523, 628). Because of the failure of *Kramer* to complete an agreement for placing a machine at Michael

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[3] The 10th and 11th were Saturday and Sunday.

Reese Hospital in Chicago, Dr. Hammond was cheated out of millions of dollars worth of stock. Kramer, Evins, and Case entered into an illegal agreement to take most of Dr. Hammond's interest in the project. Dr. Hammond went to Evins and Case with a deal to control 70% of the company, and he finished owning only 10%. On the other hand, Evins and Case received 7.5%, and Kramer got 10.5%. (R. 103-110). Kramer's role in the lawyers' scheme included substantial contacts with the State of South Carolina, as shown below.

KRAMER'S CONTACTS WITH SOUTH CAROLINA

1. Over a period of months, Kramer engaged in extensive telephone calls to South Carolina. The subject of these conferences related directly to the activities complained of in this lawsuit. Evins' and Case's draft bill shows that from August 28 until November 14 (the time period involved in this case), there were at least 55 long distance telephone calls between Kramer and Evins and Case in South Carolina. These calls were placed on at least 35 separate days and totalled hours upon hours. (R. 18, 27, 28, 30, 31, 34, 38, 41, 50, 66-67, 72-80, 140-141, 190-191, 611).

2. Kramer transmitted numerous items of correspondence and documents (including the fraudulent subscription agreements and the agreement with Michael Reese Hospital) to South Carolina, and in turn received various correspondence and documents from South Carolina. The time frame and subject of these contacts relate directly to activities complained of in this lawsuit. (R. 25, 34, 35, 39, 68-69, 366).

3. Kramer represented Dr. Hammond, a South Carolina resident, and negotiated on his behalf for the placement of a lithotripter machine at Michael Reese Hospital in Chicago, which was critical to Dr. Hammond's timely exercise of his option to purchase

the technology. Successful completion of Kramer's obligations under this contract to formally close the deal required contact with South Carolina and the execution of various documents by Dr. Hammond in South Carolina. (R. 35, 39, 46, 49-51, 365-366, 468-469, 611, 832, 833). Kramer billed Dr. Hammond for his disbursements in connection with this contract, and Dr. Hammond sent him a check from South Carolina, drawn on a South Carolina bank. (R. 1055-1057).

4. Kramer took advantage of his ability to control the timing of the closing and allowed Dr. Hammond's option to expire. Kramer closed the deal and sent documents (including the bill of sale) to South Carolina for Dr. Hammond's *necessary* signature. Unfortunately for Dr. Hammond, Kramer exercised his control and made sure this took place *after* the option period has passed. (R. 443, 456, 469).

5. Kramer drafted the agreement with Michael Reese with the assistance of his South Carolina agents, Evins and Case, and then sent the draft to South Carolina. (R. 152, 163, 165, 353).

6. Kramer became the director, and later the president, of HTI, a company whose principal place of business was South Carolina, as stated in its bylaws and letterhead. (R. 48, 414, 1103). South Carolina is also where the company's meetings were held (R. 436, 483, 548, 615, 617) and where its bank account was located. (R. 470).

7. Kramer entered into a contract for the presidency of HTI, a company with its principal place of business in South Carolina, the terms of which included a monthly salary for him of $15,000. (R. 48-49, 1103).

8. Kramer was involved in a project which contemplated involvement of a South Carolina urologist, Dr. Hammond from the State. (R. 113, 115).

9. Kramer was involved in the project to put one of the first lithotripter machines in Spartanburg, South Carolina. (R. 117, 603).

10. Medstone, formerly HTI, listed Spartanburg, South Carolina, as an address of the business on its letterhead. (R. 189).

11. In addition Kramer's scheme was carried out with the constant and essential help of Evins and Case, his South Carolina agents and co-conspirators. Evins and Kramer were "cooperating". (R. 154). The timing of the presentation of Subscription Agreement No. 2 to Dr. Hammond and the California Group and efforts to prevent Dr. Hammond from securing a letter of credit clearly demonstrate a cooperative effort to see that the ownership of HTI included participation by the lawyers.

Procedural History

Dr. Hammond filed suit in South Carolina against his South Carolina counsel and Kramer in March of 1986. The complaint sets forth causes of action for conspiracy, fraud, breach of fiduciary duty, negligence, slander and violation of the South Carolina Unfair Trade Practice Act. Kramer moved, pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure to dismiss the case for lack of personal jurisdiction.[4] Kramer did not answer the Complaint, nor did he respond to any discovery requests. Dr. Hammond noticed Kramer's deposition, and upon motion of Kramer, the deposition was limited to jurisdictional issues.

The standard recognized by both parties as applicable to the trial court's ruling on Kramer's motion to dismiss was the *prima facie* standard, which requires a plaintiff, when met with a jurisdictional challenge, to

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[4] See p. 11a of Appendix to Petition for a Writ of Certiorari.

produce evidence in support of jurisdiction.[5] Kramer never challenged the standard until he filed his brief with this Court. Previously, Kramer had argued that Dr. Hammond had not made the required *prima facie* showing. The trial court disagreed and denied Kramer's motion to dismiss in August of 1987.

Kramer then appealed to the South Carolina Supreme Court. Again, Kramer recognized the *prima facie* standard as the applicable one and vigorously argued that the facts should be interpreted so as not to establish jurisdiction.[6] In January of 1990, in a unanimous decision, the South Carolina Supreme Court affirmed the denial of Kramer's 12(b)(2) Motion to Dismiss. Kramer then filed a petition for rehearing, again presenting the *prima facie* standard and arguing for a rehearing based on a failure of proof by Dr. Hammond under that standard. In June of 1990, the Petition for Rehearing was unanimously denied.

Kramer then filed his Petition with this Court. Having lost under the *prima facie* standard, which he had theretofore recognized as the proper one, Kramer now wants a different standard. (See Question I of Kramer's Petition for a Writ of Certiorari).

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[5] Dr. Hammond's brief in the South Carolina Supreme Court at pp. 13-14; Kramer's brief in the South Carolina Supreme Court at pp. 2-3; and his Petition for Rehearing at pp. 1, 2, 3, 9, and 10.

[6] Nine pages of his brief before the South Carolina Supreme Court and all 44 pages of his reply brief were dedicated to the facts, and how they should be interpreted.

SUMMARY OF ARGUMENT

Alan Kramer, a New York lawyer, conspired with his co-defendants, South Carolina lawyers, to deprive Gaines Hammond, a South Carolina resident, of part of a business venture. The facts, as demonstrated by depositions, affidavits, and pleadings, reflect numerous South Carolina contacts related to the conspiracy between Kramer and the South Carolina lawyers, occurring both by mail and telephone. These actions were taken with the intent to harm Hammond, and they satisfy the minimum contacts and reasonableness considerations established by this Court in the jurisdiction cases beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and continuing through *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). Since the facts support *both* the minimum contacts criteria as well as a consideration of fairness, South Carolina state court jurisdiction over Kramer is proper.

In addition, the South Carolina state court procedure of determining a motion to dismiss as to jurisdiction based upon a *prima facie* standard is not constitutionally improper. The record demonstrates that jurisdiction would be proper whether a *prima facie* standard or a preponderance of the evidence standard is applied. Furthermore, the petitioner did not raise this issue before the South Carolina state trial or appellate courts, but has instead raised this issue for the first time before this Court. Finally, the issue as to the South Carolina state court rules is not one involving any dispute between the Federal Circuit Courts of Appeals, but instead relates solely to South Carolina state proceedings.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I.

THE ACTIONS OF THE PETITIONER-NEW YORK LAWYER, ALAN S. KRAMER, IN CONSPIRING WITH SOUTH CAROLINA ATTORNEYS TO DEFRAUD SOUTH CAROLINIAN GAINES HAMMOND OF HIS INTEREST IN A BUSINESS VENTURE, SATISFIED BOTH MINIMUM CONTACTS AND REASONABLENESS CONSIDERATIONS IN ALLOWING SOUTH CAROLINA STATE COURTS TO ASSERT PERSONAL JURISDICTION OVER KRAMER.

Contrary to this position espoused by the Petitioner, the real issue in this case is whether the assertion by South Carolina of jurisdiction over Kramer is constitutionally proper.[7] As already demonstrated in the Statement of the Case, Kramer worked and conspired with South Carolina lawyers to deprive and defraud a South Carolinian (Gaines Hammond) of part of his business venture. The actions undertaken by Kramer, both alone and with the South Carolina lawyers, make jurisdiction constitutionally appropriate and consistent with the principles established by this Court in the decisions from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) to *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

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[7] The Petitioner has attempted to obfuscate the true issue before this Court by his creation of the three questions presented. His second and third questions actually involve the substantive application of jurisdiction, which is considered in this section of Respondent's Brief. Petitioner's first question is procedural in nature, and is considered in this second question herein.

The Supreme Court of South Carolina, in its opinion, reviewed some of the many contacts between Kramer and the State of South Carolina. App. at 1a-5a. The Court conducted an analysis of "minimum contacts" and determined that this jurisdictional consideration was satisfied. App. at 5a-6a. Furthermore, the Court also considered whether "fair play and substantial justice" was satisfied, and it concluded that it was.[8] Thus, despite Kramer's implications to the contrary, the South Carolina Supreme Court conducted a jurisdictional analysis in accordance with constitutional parameters.

The various causes of action in the Complaint in the instant action include conspiracy, as well as fraud and deceit. The pleadings, affidavits, and depositions[9] demonstrate the extent to which Kramer worked and conspired with South Carolina lawyers against the interest of Hammond. Simply put, Kramer spoke with, wrote to, and sent documents to South Carolina, all in his efforts to coordinate with the South Carolina lawyers in taking a large share of the business venture at issue away from Hammond. Petitioner's entire analysis is fatally flawed

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[8] Petitioner apparently objects to the format of the opinion by the South Carolina Supreme Court in that it did not contain separate sections labeled "minimum contacts" and "fair play and substantial justice," with facts delineated under each section. Obviously, the form used by a State Supreme Court for its opinion is irrelevant. However, a fair reading of the South Carolina Supreme Court decision demonstrates its analysis on both issues.

[9] Significantly, much of the Record in this matter is derived from extensive depositions, which create factual support for the allegations and the jurisdictional assertions.

by his unwillingness to recognize the obvious; namely, that Kramer engaged in a series of activities over a several month period of time, which involved him working with South Carolinians (who were located in South Carolina) in a scheme directed at another South Carolinian. Kramer's argument as to his lack of contacts with South Carolina simply is not supported by the record.

The starting point of the due process analysis under the Fourteenth Amendment is whether "the Defendant purposefully established 'minimum contacts' in the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Furthermore, the minimum contacts must be based upon "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475, quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The limitations on jurisdiction based on contacts can be seen most clearly in situations where products of a manufacturer are sent to a forum state without a specific action by the manufacturer itself. *E.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). Kramer has more than satisfied the "minimum contacts" test with his wide range of activities directed at South Carolina, involving South Carolinians, and causing economic harm to a South Carolinian.

The second jurisdictional consideration is that of reasonableness. The test is whether the exercise of personal jurisdiction would offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316,

quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). As this court has stated:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interests in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi, 480 U.S. at 113, quoting *World-Wide Volkswagen*, 444 U.S. 286, 292 (1980). In *World-Wide Volkswagen*, an accident involving an automobile sold in New York to New York residents, while traveling in Oklahoma, was found to be insufficient to put the Defendant on notice that it could reasonably anticipate being brought into court in the forum State. Likewise, in an international context in *Asahi*, a company manufactured tire valve assemblies in Japan, which assemblies were incorporated into finished tires in Taiwan by another company. One of the tires ended up in California and was alleged to be the cause of an accident in that state. This Court determined that "fair play and substantial justice" precluded jurisdiction in that instance.

In the instant action, Kramer specifically directed his activities (telephone calls, letters, documents) to the forum state of South Carolina.[10] Kramer knew that

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[10] In his Petition, Kramer argues that he had no meaningful "contacts, ties or relations in or with South Carolina." P. 19, Petition for Writ of Certiorari. The numerous contacts initiated

(Continued on following page)

Hammond was a South Carolinian and that it was Hammond's portion of the business venture that Kramer and the South Carolina lawyers were taking. With the activities being aimed at South Carolina and the injuries being sustained in South Carolina (by Hammond's loss of a portion of his business venture), Kramer had every reason to anticipate being held accountable for his actions in a single proceeding against both himself and the South Carolina lawyers.[11]

Kramer's Petition inaccurately portrays the analysis of the South Carolina Supreme Court in its decision and Kramer's actions in creating the factual background to

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(Continued from previous page)

by Kramer with South Carolina demonstrate the falsity of this assertion. In point of fact, Kramer did everything but physically enter the State of South Carolina, and physical presence has never been a *requirement* by this Court for the assertion of jurisdiction.

[11] Kramer inaccurately asserts that South Carolina has not reformulated its test for due process to take into account the decisions of this Court. In fact, the South Carolina Supreme Court *in the instant decision* cited *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) as to Kramer's availment of the forum state. This is consistent with recent cases by the South Carolina appellate courts demonstrating their concern for and attention to this Court's mandates in jurisdictional cases. *E.g., Colite Indus. Inc. v. G.W. Murphy Constr.*, 297 S.C. 426, 429, 377 S.E.2d 321, 322 (1989) (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)); *Atlantic Soft Drink Co. of Columbis v. South Carolina Nat'l Bank*, 287 S.C. 228, 232, 336 S.E.2d 876, 879 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)); *Keller v. Keller*, 296 S.C. 411, 417, 373 S.E.2d 692, 693 (Ct. App. 1988) (citing *Kulko v. Superior Court*, 436 U.S. 84 (1978)).

this case. A reading of the South Carolina Supreme Court's decision makes it clear that the Court employed the requirements established by this Court for determining the constitutional limits of personal jurisdiction.[12] Not only did the Court make the necessary consideration of minimum contacts, it also made the appropriate determination as to reasonableness. Of utmost importance, Kramer, a lawyer, consciously directed activities at South Carolina in a variety of forms, and there is no room for him now to complain on either a constitutional or factual basis that he is being required to face justice in South Carolina.

II.

THE SOUTH CAROLINA STATE COURT CORRECTLY APPLIED ITS *PRIMA FACIE* STANDARD IN RULING UPON KRAMER'S PROCEDURAL MOTION TO DISMISS.

In its simplest form, the procedural issue raised by the Petitioner in the first question of his brief involves the application of a *prima facie* standard in determining the motion to dismiss. In the instant action, however, jurisdiction is proper regardless of whether a *prima facie* standard or a preponderance standard is applied. Furthermore, the question at issue involves the rules of procedure for South Carolina state courts and does not involve any conflict among the federal circuits concerning the Federal Rules of Civil Procedure.

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[12] The interest of South Carolina in providing a forum for an aggrieved resident against lawyers both in the forum state and another state in a single proceeding is self-evident.

It is interesting to note that Kramer has raised the question as to the proper standard for the first time on his Petition to this Court. While litigating this matter in South Carolina, he did not question the *prima facie* standard, and it is only after he lost at both the trial and appellate court levels in South Carolina that he raised the issue. Kramer's failure to allow the South Carolina judicial system to consider this question first, prior to raising it before this Court, is reason alone for this Court not to consider the issue.[13]

Procedurally, the jurisdictional question was considered by the South Carolina Courts pursuant to a motion to dismiss, filed under Rule 12 of the South Carolina Rules of Civil Procedure. App. at 11a - 14a. This rule is part of the South Carolina Rules of Civil Procedure, which became effective on July 1, 1985, and which were based, in large part, on the Federal Rules of Civil Procedure. However, the state rules are not identical to the federal rules, and the differences are highlighted in the

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[13] As this Court has noted on a number of occasions, ordinarily it does not decide questions which have not been raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231 (1976) (citing *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-363, n. 16 (1958)). However, the rule is not inflexible, but it is only exceptional cases that merit review of questions not considered below. *E.g., Duignan v. United States*, 274 U.S. 195, 200 (1927). In the instant case, Kramer's issue does not merit this "exceptional consideration," especially given the fact that jurisdiction is constitutionally appropriate based on his activities (See Question One of this brief) and the fact that jurisdiction would be appropriate under either the *prima facie* or the preponderance standard.

Reporter's Notes. In fact, the notes to Rule 12 demonstrate that there are differences between the Rule 12 in the South Carolina Rules of Civil Procedure and the Rule 12 in the Federal Rules of Civil Procedure. App. at 14a - 15a.

Any difference which may exist between the Federal Circuit Courts of Appeal is thus inapposite to the action before this Court. Since the South Carolina Rules of Civil Procedure are enacted for South Carolina *alone*, there is no dispute involving either the federal rules or the federal courts. The procedural question which Kramer attempts to generate therefore involves federal courts (as reflected by his numerous federal citations) and not the state courts of South Carolina. Thus, there is no constitutional question presented by the standard utilized by a state court in determining a motion to dismiss; no authorities are cited by Kramer for such a proposition and there is no constitutional issue presented for this Court on that point.

Although the South Carolina trial and appellate courts applied a *prima facie* standard (as reflected in the orders themselves)[14] Hammond would have been

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[14] Both the South Carolina Supreme Court decision and the trial level decision make reference to the utilization of a *prima facie* standard in considering a jurisdictional issue at a pretrial stage. App. at 4a, 7a. This is in accordance with the general case law in South Carolina that: "[a]t the pretrial stage of determination of jurisdiction, the plaintiff needs only to make a *prima facie* showing of jurisdiction by his pleadings and affidavits that the trial court should exercise jurisdiction." *White v. Stevens*, ___ S.C. ___, 387 S.E.2d 260, 262 (1990); (citing

(Continued on following page)

successful in defeating Kramer's Motion to Dismiss no matter which standard was applied. Kramer fails to recognize that jurisdiction in this case is appropriate not only based on the actions which he undertook alone, but also those that he undertook in conjunction with the South Carolina lawyers. He ignores the numerous telephone calls, letters, and documents that he either generated with or sent to the South Carolina lawyers. This conduct, under *any* standard, is sufficient to support jurisdiction over Kramer in South Carolina.

Kramer's reliance on summary judgment principles also demonstrates that his motion was properly denied. He cites *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), as to various matters involving considerations of motions for summary judgment. However, Kramer fails to appreciate that "[U]nder Rule 56 of the Federal Rules of Civil Procedure, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962). In the

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Fields v. INA Filtration Corp., 292 S.C. 614, 358 S.E.2d 160 (Ct. App. 1987); *Askins v. Fire Door Corp. of Florida*, 281 S.C. 611, 316 S.E.2d 713 (Ct. App. 1984)). However, that standard does not preclude a plaintiff from using other sources of support (such as depositions) or mandate that the proof cannot exceed the *prima facie* level. In the instant action, Hammond utilized additional sources of proof, and he satisfied either standard which might be applied.

instant action, *at a minimum*, Hammond demonstrated the necessary "genuine issue" on the jurisdictional subject, precluding a decision in favor of Kramer. Thus, even if reliance is given to principles governing summary judgment, jurisdiction would still be found.

Finally, it must be recognized that Kramer seeks to have this Court mandate a standard to be utilized by all state and federal courts in determining pretrial motions on jurisdiction. A distinction must be made between the procedure by which a court considers a pretrial jurisdictional challenge and whether the court ultimately finds jurisdiction. While this latter issue is one which is (and has been) a matter of constitutional significance for this Court's consideration, the procedures utilized by various courts at the pretrial stage simply do not rise to this level and, accordingly, do not warrant review by this Court.

CONCLUSION

The actions of Alan Kramer, a New York lawyer, demonstrate that he conspired with South Carolina lawyers to defraud Gaines Hammond, a South Carolina resident, of an interest in a business venture. The evidence supports the findings by the South Carolina Supreme Court as to both minimum contacts and reasonableness. Furthermore, the South Carolina state courts appropriately applied a *prima facie* standard, in acting upon Kramer's motion to dismiss. For these reasons, and for the other reasons set forth herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 12, 1990

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
OCT 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

No. 90-417

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ALAN S. KRAMER,

Petitioner,

vs.

GAINES W. HAMMOND, JR.,

Respondent.

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SUPREME COURT, U.S.

MOTION TO DEFER CONSIDERATION OF PETITION FOR CERTIORARI

Petitioner respectfully moves the Court for an order deferring consideration of the petition for a writ of certiorari in the above-captioned matter until final disposition of a related action, Kramer v. Hammond, 90 Civ. 5226 (KTD) (S.D.N.Y., Aug. 10, 1990), in which petitioner is seeking enforcement of an arbitration agreement. If this dispute is resolved through arbitration, the petition will be moot and petitioner will move to dismiss the petition pursuant to Rule 46.

Procedural History

Respondent, Hammond, filed the case below in the Court of Common Pleas of Spartanburg County, South Carolina on March 12,

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1986. Petitioner, Kramer, moved to dismiss Hammond's complaint for lack of personal jurisdiction on April 8, 1986. Because he moved to dismiss, Kramer was not required to answer the complaint pending resolution of his motion by the trial court. By order dated August 8, 1987, the trial court denied Kramer's motion to dismiss. On January 22, 1990, the South Carolina Supreme Court affirmed the trial court decision, and on June 11, 1990, it denied Kramer's petition for rehearing. Kramer was not required to answer the complaint while his appeal and rehearing petition were pending in the South Carolina Supreme Court.

On August 9, 1990, Kramer served and filed his answer to Hammond's complaint, specifically asserting as an affirmative defense the existence of an arbitration agreement barring Hammond's claims.* On August 10, 1990, Kramer commenced an action against Hammond in the United States District Court for the Southern District of New York pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., requesting an order enforcing the arbitration agreement, which requires binding arbitration in New York City pursuant to the Rules of the American Arbitration Association. Kramer v. Hammond, 90 Civ. 5226 (KTD) (S.D.N.Y., Aug. 10, 1990). (Kramer's petition to compel arbitration and Hammond's answer to that petition are attached hereto as Exhibits "A" and "B").

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*After his petition for rehearing was denied, Kramer moved for a continuation of the stay of proceedings against him, including his time to answer, pending filing and determination of a petition for a writ of certiorari in this Court. On July 11, 1990, Kramer's request for a stay pending petition to this Court was denied by the South Carolina Supreme Court.

Reasons for Granting the Motion

Kramer's time to file a petition for a writ of certiorari to review the decision of the South Carolina Supreme Court was running while his petition to compel arbitration was pending in the Southern District of New York. Hammond's answer to the petition to compel arbitration was not due until the last day of the ninety-day period to petition this Court. Since the arbitration petition could not be decided prior to the certiorari deadline, Kramer had two procedural choices. Either he could move for an extension of his time to file a certiorari petition, or he could file a timely certiorari petition and move to defer consideration of the petition pending determination of his petition to compel arbitration. Because final disposition of his petition to compel arbitration was unlikely even with a full sixty-day extension,** Kramer chose the latter option.

Accordingly, if the motion to defer is granted, and this dispute proceeds to arbitration, consideration of Kramer's petition for a writ of certiorari will be unnecessary. If arbitration is denied, however, consideration of Kramer's certiorari petition will be necessary.

For the above reasons, petitioner requests that an order be entered deferring consideration of his petition for certiorari

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**The governing statute and rule only permit an extension "for a period not exceeding sixty days," 28 U.S.C. § 2101(c); Rule 13.2, and a full sixty-day extension is granted only in "the most compelling situations." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 6.7(c), at 322 (6th ed. 1986).

Rev. 1/90

PETITIONER	RESPONDENT
ALAN S. KRAMER	GAINES W. HAMMOND

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)	ATTORNEYS (IF KNOWN)
JACKSON & NASH (212) 370-8100 330 Madison Avenue New York, New York 10017	

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

Petition to Compel Arbitration under 9 U.S.C. Section 1 et seq.

Has this or a similar cause been previously filed in SDNY at anytime? No ☒ Yes ☐ Judge Previously Assigned _____

If yes, was this case Vol. ☐ Invol. ☐ Dismissed. No ☐ Yes ☐ If yes, give date _____ & Case No. _____

(PLACE AN ☒ IN ONE BOX ONLY)

NATURE OF SUIT

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
[ ] 110 INSURANCE [ ] 120 MARINE [ ] 130 MILLER ACT [ ] 140 NEGOTIABLE INSTRUMENT [ ] 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT [ ] 151 MEDICARE ACT [ ] 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL. VETERANS) [ ] 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS [ ] 160 STOCKHOLDERS' SUITS [ ] 190 OTHER CONTRACT [ ] 195 CONTRACT PRODUCT LIABILITY	PERSONAL INJURY [ ] 310 AIRPLANE [ ] 315 AIRPLANE PRODUCT LIABILITY [ ] 320 ASSAULT, LIBEL & SLANDER [ ] 330 FEDERAL EMPLOYERS' LIABILITY [ ] 340 MARINE [ ] 345 MARINE PRODUCT LIABILITY [ ] 350 MOTOR VEHICLE [ ] 355 MOTOR VEHICLE PRODUCT LIABILITY [ ] 360 OTHER PERSONAL INJURY PERSONAL INJURY [ ] 362 PERSONAL INJURY-MED MALPRACTICE [ ] 365 PERSONAL INJURY PRODUCT LIABILITY [ ] 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY PERSONAL PROPERTY [ ] 370 OTHER FRAUD [ ] 371 TRUTH IN LENDING [ ] 380 OTHER PERSONAL PROPERTY DAMAGE [ ] 385 PROPERTY DAMAGE PRODUCT LIABILITY	[ ] 610 AGRICULTURE [ ] 620 FOOD & DRUG [ ] 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881 [ ] 630 LIQUOR LAWS [ ] 640 R.R. & TRUCK [ ] 650 AIRLINE REGS [ ] 660 OCCUPATIONAL SAFETY/HEALTH [ ] 690 OTHER LABOR [ ] 710 FAIR LABOR STANDARDS ACT [ ] 720 LABOR/MGMT. RELATIONS [ ] 730 LABOR/MGMT REPORTING & DISCLOSURE ACT [ ] 740 RAILWAY LABOR ACT [ ] 790 OTHER LABOR LITIGATION [ ] 791 EMPL. RET. INC. SECURITY ACT	[ ] 422 APPEAL 28 USC 158 [ ] 423 WITHDRAWAL 28 USC 157 PROPERTY RIGHTS [ ] 820 COPYRIGHTS [ ] 830 PATENT [ ] 840 TRADEMARK SOCIAL SECURITY [ ] 861 HIA(1395FF) [ ] 862 BLACK LUNG(923) [ ] 863 DIWC(405(g) [ ] 863 DIWW(405(g)) [ ] 864 SSID TITLE XVI [ ] 865 RSI(405(g)) FEDERAL TAX SUITS [ ] 870 TAXES [ ] 871 IRS-THIRD PARTY 26 USC 7609	[ ] 400 STATE REAPPORTIONMENT [ ] 410 ANTITRUST [ ] 430 BANKS & BANKING [ ] 450 COMMERCE/ICC RATES/ETC. [ ] 460 DEPORTATION [ ] 470 RACKETEER INFLUENCED & CORRUPT ORGANIZATION ACT (RICO) [ ] 810 SELECTIVE SERVICE [ ] 850 SECURITIES/COMMODITIES/EXCHANGE [ ] 875 CUSTOMER CHALLENGE 12 USC 3410 [ ] 891 AGRICULTURAL ACTS [ ] 892 ECONOMIC STABILIZATION ACT [ ] 893 ENVIRONMENTAL MATTERS [ ] 894 ENERGY ALLOCATION ACT [ ] 895 FREEDOM OF INFORMATION ACT [ ] 900 APPEAL OF FEE DETERMINATION UNDER EQUAL ACCESS TO JUSTICE [ ] 950 CONSTITUTIONALITY OF STATE STATUTES [X] 890 OTHER STATUTORY ACTIONS

ACTIONS UNDER STATUTES

REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS
[ ] 210 LAND CONDEMNATION [ ] 220 FORECLOSURE [ ] 230 RENT LEASE & EJECTMENT [ ] 240 TORTS TO LAND [ ] 245 TORT PRODUCT LIABILITY [ ] 290 ALL OTHER REAL PROPERTY	[ ] 441 VOTING [ ] 442 EMPLOYMENT [ ] 443 HOUSING/ ACCOMMODATIONS [ ] 444 WELFARE [ ] 440 OTHER CIVIL RIGHTS	[ ] 510 MOTIONS TO VACATE SENTENCE 28 USC 2255 [ ] 530 HABEAS CORPUS [ ] 535 DEATH PENALTY [ ] 540 MANDAMUS & OTHER [ ] 550 CIVIL RIGHTS

Check if demanded in complaint

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ $6.5 million arbitration OTHER

Check YES only if demanded in complaint

JURY DEMAND: ☐ YES ☒ NO

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y.?

IF SO, STATE:

JUDGE _____ DOCKET NUMBER _____

NOTE: Please submit at the time of filing an explanation of why cases are deemed related.

(SEE REVERSE)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

ALAN S. KRAMER,

Petitioner,

V.

GAINES W. HAMMOND,

Respondent.

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

90 CIV. 5226

TO: (Name and Address of Defendant)

Gaines W. Hammond
391 Serpentine Drive
Spartanburg, South Carolina 29305

JUDGE DUFFY

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PETITIONER'S ~~PLAINTIFF'S~~ ATTORNEY (name and address)

JACKSON & NASH
330 Madison Avenue
New York, New York 10017

an answer to the ~~complaint~~ petition which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

AUG 1 0 1990

RAYMOND F. BURGHARDT, CLERK

CLERK

DATE

BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration Between	
ALAN S. KRAMER, Petitioner,	__ Civ. ____ VERIFIED PETITION TO COMPEL ARBITRATION
and	
GAINES W. HAMMOND, Respondent.	

The Petition of Alan S. Kramer respectfully shows:

THE PARTIES

1. Petitioner is a citizen of the State of New York and a resident of the City and County of New York.

2. Upon information and belief, respondent is a citizen of the State of South Carolina.

JURISDICTION AND VENUE

3. This Petition is brought for relief under the Federal Arbitration Act (9 U.S.C. §1 et seq.).

4. The jurisdiction of this Court is based upon the diversity of citizenship of the parties pursuant to 28 U.S.C. §1332. The matter in controversy exceeds the sum of $50,000 exclusive of interest and costs.

5. This Court has jurisdiction over the person of respondent and venue lies in this District by virtue of respondent's agreement to arbitrate the dispute between the parties in New York City and by virtue of his having commenced

an action against petitioner involving that dispute in the Supreme Court of the State of New York, County of New York entitled Gaines W. Hammond v. Alan S. Kramer, Index No. 21813/87 (the "New York Action").

6. The Arbitration Agreement herein is within the scope of the Federal Arbitration Act because the controversy draws into issue transactions involving commerce between the States. Interstate commerce is involved in that the dispute pertains to subscriptions for the stock of a Delaware corporation by citizens of New York, South Carolina, California and other States and involves the transfer by license of technology owned by citizens of the State of California to such Delaware corporation pursuant to an option obtained by respondent who was then a citizen of South Carolina.

FACTS

7. In September 1984, respondent entered into an option to license a technology for the non-invasive shattering of kidney stones by extracorporeal shockwave lithotripsy. The option was granted by the inventors of that technology, citizens of California ("California Inventors"). The license was to be granted to a Delaware corporation, Hammond Technologies, Inc., which changed its name to Medstone International, Inc. ("Medstone"). Simultaneously, Medstone agreed to sublicense the technology for the State of California to a corporation formed by the California Inventors.

8. At or about the same time the option was entered

into, in September 1984, Medstone was formed and a Subscription Agreement for its stock was entered into by respondent, petitioner, the California Inventors and others. A copy of such Subscription Agreement is annexed hereto as Exhibit "A" and is hereinafter referred to as the "Original Subscription Agreement".

9. At or about the time the Original Subscription Agreement was entered into, petitioner, respondent, the California Inventors and others entered into an Arbitration Agreement which provided, in pertinent part as relevant here, that ". . . any dispute arising between the parties in which this Agreement [the 'Subscription Agreement'] or its interpretation is in issue . . . shall be settled by arbitration in New York City in accordance with the rules of the American Arbitration Association. . . ." The Arbitration Agreement is annexed hereto as Exhibit "B".

10. The option by its terms was to expire on November 8, 1984. On that date, it expired without being exercised. Shortly thereafter, the parties to the Original Subscription Agreement entered into a revised subscription agreement (the "Revised Subscription Agreement") which amended the provisions of the Original Subscription Agreement. A copy of the Revised Subscription Agreement is annexed hereto as Exhibit "C".

11. Among the changes provided for in the Revised Subscription Agreement was a reallocation of the subscription rights in Medstone pursuant to which respondent's interest was

reduced and those of the California Inventors and petitioner were increased.

LAWSUITS COMMENCED BY RESPONDENT AND PROCEDURAL HISTORY

12. In March 1986, respondent sued his former attorneys and petitioner in South Carolina (the "South Carolina Action") alleging that petitioner, who had acted as counsel for the California Inventors with respect to the option, license, sublicense, Original and Revised Subscription Agreements, had conspired with respondent's South Carolina counsel to reduce respondent's subscription interest in Medstone and had caused such reduction by fraud, breach of fiduciary duty and negligence. A copy of the complaint in the South Carolina Action is annexed hereto as Exhibit "D".

13. Petitioner immediately moved to dismiss the South Carolina complaint for lack of personal jurisdiction.

14. In August 1987, the South Carolina Court of Common Pleas found jurisdiction over petitioner.

15. In September 1987, respondent commenced the New York Action. The allegations in the New York Action are substantially similar to the claims asserted in the South Carolina Action. A copy of the complaint in the New York Action is annexed hereto as Exhibit "E".

16. Thereafter, petitioner moved for summary judgment in the New York Action. In response, the court stayed the action pending disposition of petitioner's appeal of the jurisdictional motion in South Carolina.

17. The denial of petitioner's jurisdictional motion in South Carolina was affirmed in January, 1990 and a petition for rehearing was denied by the South Carolina Supreme Court in June, 1990.

18. Petitioner has made an oral demand on respondent to arbitrate pursuant to the Arbitration Agreement and respondent has not replied to such demand.

19. Petitioner answered the South Carolina Action complaint on August 10, 1990, and asserted the agreement to arbitrate as an affirmative defense. A copy of the answer in the South Carolina Action is annexed hereto as Exhibit "F".

ARBITRABILITY

20. The South Carolina Action and New York Action complaints involve a dispute in which the parties' subscription interest is in issue. Respondent's essential claim in both the New York and South Carolina Actions is that respondent is entitled to more than the subscription interest he received under the Original and Revised Subscription Agreements. Specifically, respondent alleges that (a) he should have received rights to subscribe to 70,000 Medstone Common Stock in the original Subscription Agreement and was allocated only 35,000, that he agreed to accept the lesser amount in reliance on the alleged misrepresentation of one of his South Carolina lawyers that he would be able to control Medstone, and (b) that petitioner and respondent's South Carolina lawyers conspired to allow the option to expire thereby giving the California

Inventors the right to reset subscription allocations, and that in the reallocations respondent was reduced from 35,000 to 10,000 subscription rights. The claims asserted by respondent are within the scope of the parties Arbitration Agreement.

21. No previous application has been made for the relief sought herein.

WHEREFORE, petitioner requests that this Court:

(a) issue an order compelling respondent to arbitrate the disputes under the South Carolina and New York complaints pursuant to 9 U.S.C. §4; and

(b) award to petitioner such other equitable and legal relief to which petitioner may be entitled under the Federal Arbitration Act or as otherwise provided.

Dated: New York, New York
August 10, 1990

JACKSON & NASH

By: _____
Jeffrey G. Steinberg (JS-[illegible])
Attorneys for Petitioner
330 Madison Avenue
New York, New York 10017
(212) 370-8100

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ALAN S. KRAMER, being duly sworn, deposes and says:

I am the petitioner in the within proceeding; I have read the Petition to Compel Arbitration and know the contents thereof; and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

ALAN S. KRAMER

Sworn to before me this
~~9th~~ 11th day of August, 1990

Notary Public

LISA S. TANKOOS
Notary Public, State of New York
No. 31-4849066
Qualified in New York County
Commission Expires March 30, 19 91

The undersigned agree that the Subscription Agreement between the undersigned for common stock of Hammond Technology, Inc., the Option for License Agreement between Errol Payne, Richard Penfil and Charles McGregor on the one part and Gaines W. Hammond on the other part ("Option Agreement"), and the License Agreement and Sublease Agreement which are Exhibits B and D respectively to the Option Agreement, shall each be subject to the provisions for arbitration annexed hereto as Exhibit A as if fully set forth in each of such Agreements.

This Agreement is effective the date of the Agreement it supplements.

Gaines W. Hammond, Jr. M.D.

Errol Payne

Richard Penfil M.D.

Charles McGregor

Thomas A. Evins, Esq.

Alan S. Kramer, Esq.

Gary P. Clisham

David Blunt

Tom Gardner

ARBITRATION. (a) Except as provided in Subsection (b), any dispute arising between the parties in which this Agreement or its interpretation is in issue or alleging any breach thereof shall be settled by arbitration in New York City in accordance with the rules of the American Arbitration Association then in effect, by three arbitrators selected by the Association from its panel of arbitrators. Judgment upon the award of the arbitrator may be entered in any court of competent jurisdiction.

(b) In the event that any party is entitled to equitable relief in the form of a temporary restraining order, preliminary injunction or attachment in a dispute among them which is arbitratable under subparagraph (a), such party may nevertheless commence an action solely for the purpose of obtaining such preliminary relief but the dispute between the parties giving rise to the claim as to which preliminary relief is sought shall nevertheless be settled by arbitration whether or not such preliminary relief is granted. Such preliminary relief may be sought prior to or at the time of commencing an arbitration proceeding or during its pendency when a proper basis therefore exists under the laws of the jurisdiction from whose courts such relief is sought.

Exhibit A

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG) 86-CP-42-574

Gaines W. Hammond, Jr.,)
)
Plaintiff,)
)
vs.)
)
Butler, Means, Evins and)
Browne, Thomas A. Evins,) ANSWER OF DEFENDANT ALAN S. KRAMER
Stanley T. Case, and)
Alan S. Kramer,)
)
Defendants.)

Subject to his Rule 12(e) motion, filed herewith, defendant Alan S. Kramer answers the complaint of the plaintiff as follows:

FIRST DEFENSE

1. Denied for lack of information and belief, except admitted, upon information and belief, that plaintiff was engaged in the practice of urology from August 1984 through November 1984.

2. This defendant is not sufficiently aware of the legal composition of Butler, Means, Evins & Browne, or the duties of its individual members, to respond affirmatively to the allegations of paragraph 2, and they are therefore denied. Defendant admits that plaintiff introduced Thomas A. Evins and Stanley T. Case to him as plaintiff's attorneys.

3. Admitted only that defendant Kramer is an attorney licensed to practice law and living in the State of New York. The remaining allegations are emphatically denied.

4. Denied for lack of information and belief, except admitted that plaintiff introduced Evins and Case as his

attorneys and Evins and Case negotiated with defendant as counsel for the California Group with respect to an Option Agreement, a License Agreement, a Sub-license Agreement and a Subscription Agreement.

5. Admitted, except that Payne, Penfil and McGregor were, to the best of defendant's knowledge, the only inventors of the technology described, and the option obtained by plaintiff was required to be assigned to a corporation.

6. Admitted.

7. Admitted that the Option Agreement had various requirements but denied that the option exercise price was $1,200,000. Reference should be made to the Option Agreement for its terms and conditions and to the License Agreement for the royalty to be paid upon exercise of the Option Agreement.

8. Admitted that the quoted terms are part of the Option Agreement, although not quoted accurately, and reference should be made to the Option Agreement for the terms thereof.

9. Denied, except admitted that plaintiff met with the California Group, and defendant further alleges that the purpose of the meeting was not solely to form a corporation, that the purpose of the corporation was not solely to market the technology, and that a corporation, not the plaintiff, was the party to acquire licensing rights in the technology. Plaintiff's intent is denied for lack of information and belief.

10. Admitted that Evins and Case represented plaintiff and defendant represented the California Group in the negotiations

between plaintiff and the California Group in August and September 1984.

11. Denied.

12. Denied.

13. Denied, and reference is made to the Subscription Agreement with an "as of" execution date of August 30, 1984 for the terms and conditions applicable to the parties.

14. Denied for lack of information and belief.

15. Denied for lack of information and belief.

16. Denied in that plaintiff's alleged "belief" would have been directly contrary to the contract documents.

17. Admitted only that plaintiff freely and voluntarily signed the subscription agreement.

18. Denied for lack of information and belief, except denied that plaintiff reasonably could have believed that he would control a majority of the corporation, and denied that the Subscription Agreement was drafted by his attorneys, and reference is made to the Subscription Agreement to ascertain the terms thereof.

19. Denied, except denied for lack of information and belief as to the allegations concerning representations made to plaintiff by Irvine and Case, and denied that any such representations were material in that plaintiff could not have reasonably relied upon any such representations.

20. Denied, except denied for lack of information and belief as to plaintiff's reliance, and denied that the plaintiff reasonably could have relied on any such alleged representations.

21. Denied, except denied for lack of information and belief as to any alleged representations by and the intention of Evins and Case, but admitted that plaintiff signed the Subscription Agreement.

22. Denied, except to admit that an agreement was entered into between Medstone International, Inc. and Michael Reese Hospital and Medical Center and Michael Reese Second Century Foundation ("Michael Reese"), dated November 14, 1984, (the "Michael Reese Agreement"), and reference is made to that agreement for its terms and conditions, and admitted that plaintiff participated in negotiations which resulted in that Agreement.

23. Admitted.

24. Admitted.

25. Denied.

26. Denied, except admitted that a letter of credit was essential to the consummation of the Michael Reese Agreement and that plaintiff entered into an agreement with Dr. Gerald Wallace dated November 6, 1984 (the "Hammond-Wallace Agreement"). Plaintiff's motivation in entering into that agreement is denied for lack of information and belief.

27. Denied, except whether plaintiff viewed the Hammond-Wallace Agreement as favorable to him is denied for lack of information and belief.

28. Denied, except that Evins' alleged criticism is denied for lack of information and belief.

29. Denied, except admitted that the plaintiff, following receipt of advice from independent counsel, signed the Subscription Agreement dated November 9, 1984.

30. Denied as to plaintiff's beliefs for lack of information and belief. If the reference to plaintiff's attorneys includes this defendant, this defendant denies that he was plaintiff's attorney. Defendant refers to the Amended Subscription Agreement dated as of November 9, 1984 for the terms thereof and admits plaintiff signed that agreement.

31. Defendant answers by referring to his responses to paragraphs 1 through 30 of the complaint as set forth heretofore.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

39. Defendant answers by referring to his responses to paragraphs 1 through 38 of the complaint as set forth heretofore.

40. Denied.

41. Denied.

42. Defendant answers by referring to his responses to paragraphs 1 through 41 of the complaint as set forth heretofore.

43. Denied for lack of information and belief.

44. Denied.

45. Denied.

46. Defendant answers by referring to his responses to paragraphs 1 through 45 of the complaint as set forth heretofore.

47. Denied.

48. Denied.

49. Defendant answers by referring to his responses to paragraphs 1 through 48 of the complaint as set forth heretofore.

50. Admitted only that plaintiff was engaged in the practice of urology in Spartanburg, South Carolina, otherwise denied for lack of information and belief.

51. Denied.

52. Denied to the extent "Defendant" refers to this defendant, otherwise, denied for lack of information and belief.

53. Denied for lack of information and belief.

54. Defendant answers by referring to his responses to paragraphs 1 through 53 of the complaint as set forth heretofore.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. All allegations of the complaint are denied except as heretofore admitted, modified or explained.

SECOND DEFENSE TO FIRST CAUSE OF ACTION

60. Plaintiff has failed to state facts sufficient to constitute a cause of action for fraud and deceit.

SECOND DEFENSE TO SECOND CAUSE OF ACTION

61. Plaintiff has failed to state facts sufficient to

constitute a cause of action against this defendant for breach of fiduciary duty.

SECOND DEFENSE TO THIRD CAUSE OF ACTION

62. Plaintiff has failed to state facts sufficient to constitute a cause of action against this defendant for legal malpractice.

SECOND DEFENSE TO FOURTH CAUSE OF ACTION

63. Plaintiff has failed to state facts sufficient to constitute a cause of action against this defendant for conspiracy.

SECOND DEFENSE TO FIFTH CAUSE OF ACTION

64. Plaintiff has failed to state facts sufficient to constitute a cause of action against this defendant for slander, libel or defamation.

SECOND DEFENSE TO SIXTH CAUSE OF ACTION

65. Plaintiff has failed to state facts sufficient to constitute a cause of action under the South Carolina Unfair Trade Practices Act. Moreover, that act is unconstitutional in that it violates the due process clause of the United States Constitution and South Carolina Constitution and further unconstitutionally delegates enforcement authority to an administrative agency.

THIRD DEFENSE TO THIRD CAUSE OF ACTION

66. If this cause of action is taken to refer to defendant Kramer, and is an attempt to allege a cause of action for legal malpractice, then this defendant would show that it was not possible for any alleged negligence or fault on his part to have

caused the plaintiff any damages in the absence of equal or greater fault on the part of the plaintiff, which combined and concurred with any alleged fault on the part of the defendants to bring about any alleged legal injury to the plaintiff..

67. The contributory negligence, recklessness, willfulness, or other degree of fault, on the part of plaintiff was:

(a) His misleading the other subscribers to the August 30, 1984 Subscription Agreement to believe plaintiff had the ability to raise the License royalty in the time provided for in the Option Agreement;

(b) His negotiating an inadequate amount of time to raise the License fee, knowing he required the resources of others;

(c) His pursuit of ineffectual activities to raise the License royalty;

(d) His entering into the Hammond-Wallace Agreement in direct violation of the instructions of his attorneys Ervin and Case and in direct violation of various terms and conditions of the agreements entered into with the California Group;

(e) His arranging under the Hammond-Wallace agreement for the profitable sale of his subscription interests in Medstone to Wallace, without offering this arrangement to, or providing a similar arrangement for, other Medstone subscribers, at a

time when he was president and a director of Medstone;

(f) His failure to pursue the guarantee of the letter of credit for Michael Reese with persons in Spartanburg, South Carolina and its environs; and,

(g) His failure to provide Gerald Wallace with a guarantee which Wallace required to protect him against loss under the letter of credit.

Without this fault on the part of plaintiff, no loss or injury would have occurred and this contributory negligence, recklessness, willfulness, or other degree of fault is pled as an absolute bar to any recovery by the plaintiff herein.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

68. The facts alleged pursuant to causes of action First through Sixth fail to state any other causes of action against defendant recognized in law or in equity.

FURTHER DEFENDANT TO ALL CAUSES OF ACTION

69. Any damage suffered by plaintiff arose out of his willful and reckless conduct as more fully set forth in paragraph 67.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

70. To the extent that plaintiff attempts to allege an injury or damages from the expiration of the option agreement on November 8, 1984, he has failed to state facts sufficient to constitute a cause of action against the defendants because, at the time the option expired, it was owned by Hammond

to pursue these claims.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

71. In that the plaintiff, with prior knowledge of all relevant facts, executed written documents which fixed his stock ownership in Hammond Technologies, Inc. which became Medstone International, Inc., and then worked as an officer and director of Medstone from November 1984 until July 1985, he is bound by those agreements and he has waived, and is estopped to assert, any cause of action for alleged losses arising out of the agreements among the parties.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

72. The plaintiff is barred by laches from pursuing the causes of action stated in his complaint.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

73. This Court lacks personal jurisdiction over this defendant, and the exercise of jurisdiction will violate the due process clause of the Fourteenth Amendment to the United States Constitution.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

74. The plaintiff executed an Arbitration Agreement subjecting the claims asserted to arbitration in New York City in accordance with the Rules of the American Arbitration Association.

75. The arbitration agreement is pled as an absolute bar to the plaintiff pursuing any claim under this complaint other than by arbitration in New York City.

that the complaint of the plaintiff be dismissed with costs.

J. D. Todd, Jr.
C. Doyle Martin

By: _____

LEATHERWOOD WALKER TODD & MANN, P. C.
100 East Coffee Street
P. O. Box 87
Greenville, South Carolina 29602
(803) 242-6440

ATTORNEYS FOR DEFENDANT ALAN S. KRAMER

Greenville, S. C.

August 9, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration Between	:	90 Civ. 5226 (KTD)
ALAN S. KRAMER,	:	**ANSWER TO PETITION TO COMPEL ARBITRATION**
Petitioner,	:	
and	:	
GAINES W. HAMMOND,	:	
Respondent.	:	

Respondent Gaines W. Hammond, by his attorneys, Kornstein Veisz & Wexler, respectfully answers the Petition herein as follows:

1. Respondent admits upon information and belief the allegations of Paragraph 1.

2. Respondent admits the allegations of Paragraph 2.

3. Respondent admits that the Petition purports to seek relief under the Federal Arbitration Act, as alleged in Paragraph 3.

4. Respondent admits upon information and belief that petitioner and respondent are of diverse citizenship and that the matter in controversy exceeds the sum of $50,000 exclusive of interest and costs.

5. Respondent denies the allegations of Paragraph 5, except admits that, if the disputes at issue in the South Carolina and New York Actions are found to be subject to a valid,

enforceable agreement to arbitrate that petitioner has not waived, which respondent denies, then this Court would have personal jurisdiction over respondent and venue in this District would be proper.

6. Respondent denies the allegations of Paragraph 6, except admits that, if the disputes at issue in the South Carolina and New York Actions are found to be subject to a valid, enforceable agreement to arbitrate that petitioner has not waived, then the transactions at issue would involve commerce between the states.

7. Respondent denies the allegations of Paragraph 7 and respectfully refers the Court to the option, license and sublicense agreements, which are annexed to the complaint filed by respondent in the South Carolina Action in March 1986 (Exhibit A hereto), for the terms thereof. The facts concerning the dispute between the parties are found in that complaint, to which respondent respectfully refers the Court.

8. Respondent denies the allegations of Paragraph 8.

9. Respondent denies the allegations of Paragraph 9.

10. Respondent denies the allegations of Paragraph 10.

11. Respondent denies the allegations of Paragraph 11.

12. Respondent admits only that in March 1986 he commenced an action in South Carolina against his former attorneys, one of whom was petitioner. As to the remaining allegations of Paragraph 12, which purport to summarize the complaint in the South Carolina Action, respondent respectfully

refers the Court to that complaint, which is annexed hereto as Exhibit A.

13. Respondent admits that after the filing of the South Carolina Action, petitioner filed a motion to dismiss that action for lack of personal jurisdiction. Respondent additionally alleges that petitioner's jurisdictional motion failed to assert any defense or objection that the disputes alleged in the complaint were subject to arbitration.

14. Respondent admits the allegations of Paragraph 14.

15. Respondent admits the allegations of Paragraph 15. Respondent additionally alleges that petitioner's answer in the New York Action failed to assert any defense or objection that the disputes alleged in that complaint were subject to arbitration.

16. Respondent admits the allegations of Paragraph 16.

17. Respondent admits the allegations of Paragraph 17.

18. Respondent denies the allegations of Paragraph 18.

19. Respondent admits the allegations of Paragraph 19.

20. Respondent denies the allegations of Paragraph 20.

21. Respondent admits upon information and belief the allegations of Paragraph 21.

FIRST AFFIRMATIVE DEFENSE

22. The Petition fails to state a claim for relief under the Federal Arbitration Act, 9 U.S.C. § 1 et seq.

SECOND AFFIRMATIVE DEFENSE

23. There exists no valid, enforceable arbitration agreement between the parties concerning the disputes at issue in the South Carolina and New York Actions.

THIRD AFFIRMATIVE DEFENSE

24. Even if there were a valid, enforceable arbitration agreement, Petitioner, by virtue of his conduct, has waived any right to arbitrate the disputes at issue in the South Carolina and New York Actions.

FOURTH AFFIRMATIVE DEFENSE

25. Even if there were a valid, enforceable arbitration agreement and petitioner had not waived his right to arbitration, the disputes at issue in the South Carolina and New York Actions are not within the scope of the alleged arbitration agreement.

FIFTH AFFIRMATIVE DEFENSE

26. Petitioner, by virtue of his conduct, is estopped to assert that the disputes in the South Carolina and New York Actions are subject to arbitration.

SIXTH AFFIRMATIVE DEFENSE

27. Petitioner is barred from seeking any equitable relief compelling arbitration by virtue of the doctrine of laches.

WHEREFORE, respondent respectfully requests that this Court:

(i) deny petitioner's request for an order compelling respondent to arbitrate the disputes in the South Carolina and New York Actions pursuant to 9 U.S.C. § 4;

(ii) deny petitioner any other equitable or legal relief under the Federal Arbitration Act or otherwise;

(iii) dismiss this action in its entirety with prejudice; and

(iv) award respondent the costs and disbursements of defending this action, including reasonable attorneys' fees, and such other and further relief as the Court may deem appropriate.

Dated: September 10, 1990
New York, New York

KORNSTEIN VEISZ & WEXLER

By: Richard F. Lubarsky
Richard F. Lubarsky (RL-4456)
757 Third Avenue
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Of Counsel

Exhibit A

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

GAINES W. HAMMOND, JR.,)
)
Plaintiff,)
)
vs.)
)
BUTLER, MEANS, EVINS AND)
BROWNE, THOMAS A. EVINS,)
STANLEY T. CASE, AND)
ALAN S. KRAMER,)
)
Defendants.)

COMPLAINT
(JURY DEMANDED)

The Plaintiff, complaining of the Defendants above named, would respectfully show unto the Court:

GENERAL

1. The Plaintiff is a resident of Spartanburg, South Carolina engaged in the practice of urology.

2. Upon information and belief, the Defendant, Butler, Means, Evins and Browne, is a partnership of Thomas A. Evins, T. Sam Means, Jr., R. E. Browne, III, Elford H. Morgan, Thomas A. Phillips, Edward R. Cole, Amos A. Workman, Stanley T. Case, Roger M. Bradford, and T. Alexander Evins, (hereinafter referred to as Butler Means) established under the laws of South Carolina for the purpose of practicing law in the State of South Carolina. The Defendant, Butler Means, holds itself out as a partnership in Spartanburg, South Carolina and, upon information and belief, was at all times complained of performing legal services in South Carolina. The Defendants, Thomas A. Evins and Stanley T. Case, upon information and belief, are members and partners in the Defendant Law Firm of Butler Means, and at all times complained of were acting as partners and agents of said Law Firm. Upon information and belief, the Defendants, Evins and Case, were the individual attorneys assigned the

responsibility for handling the Plaintiff's legal affairs, the details for which are set out more fully below.

3. Mr. Alan S. Kramer is an attorney licensed and living in the State of New York. Mr. Kramer was an agent for HTI now Medstone International, Inc., which at some of the times complained of had its principal place of business in South Carolina. Mr. Kramer entered into contracts to be performed in whole or in part in South Carolina. Mr. Kramer had numerous contacts with South Carolina in particular but not limited to contacts with Mr. Case and Mr. Evins. Upon information and belief, Mr. Kramer in concert with Mr. Case and/or Mr. Evins entered into a conspiracy and an agreement to fool, cheat and manipulate the Plaintiff so as to greatly dilute and/or take away Plaintiff's rights and/or interest in what is now known as Medstone International Inc. The conspiracy resulted in the Plaintiff's attorneys and their co-counsel ending up with 18,000 shares in the company Plaintiff started and hired them to organize. Due to the conspiracy, the Plaintiff, while starting with 70,000 shares, ended-up with only 10,000 shares.

4. In August of 1984, the Plaintiff engaged the services of the Defendants, Evins and Case, to assist him and represent him with respect to his plans to enter into an Option Agreement for the purchase of licensing rights for the non-invasive lithrotripting of kidney stones, and the formation of a corporation to ultimately own these licensing rights and engage in the marketing of the technology.

5. In September of 1984, the Plaintiff entered in to an Option Agreement with the inventors of the technology described above. Among these inventors were Errol Payne, Dr. Richard Penfil, and Charles McGregor, hereinafter referred to collectively as "The California Group", whereby in exchange for the purchase price of $50,000.00, the Plaintiff was granted an option to purchase the license to the technology described above.

6. By the terms of the Option Agreement, the Option was scheduled to

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expire on October 22, 1984, later extended to November 8, 1984 upon the receipt by The California Group of the sum of $25,000.00.

7. The Option Agreement required the Plaintiff to meet certain obligations as a condition to the exercise of this Option, specifically the payment of $1,200.00.

8. Section 1.5 of the Option Agreement, which is attached hereto as Exhibit "A" and incorporated herein provides:

> A condition to Optionees exercise of this Option shall be:
>
> (a) Optionee obtaining the written consent of investors to a plan to capitalize the enterprise which is to be the Licensee under the license agreement, investors agreeing that they will consent to any plan of capitalization which provides for such enterprise to have, a net worth (excluding the value of the license agreement) of not less than $2,000,000.00 within six months from the commencement date (as hereinafter defined) but not less than $4,000,000.00 within one year from such date;
>
> (b) Optionees consent to an agreement proposed by investors for the limited market rights or devices incorporated in the the invention, Gary P. Klisham or an entity designed by him and acceptable to the inventors, such rights to be granted by Licensee under the license agreement; and
>
> (c) The Licensee under the license agreement entering into an sublicense agreement in the form annexed hereto as Exhibit "B". The inventors may in their sole discretion waive any of the conditions contained in this Section 1.5.

9. Prior to August 30, 1984, the Plaintiff and The California Group met in California and entered into negotiations to form a corporation to market the technology which the Plaintiff intended to purchase through the exercise of the Option.

10. The Plaintiff was represented in these negotiations by Defendants, Evins and Case. The California Group was represented by Defendant, Alan S. Kramer.

11. As a result of these negotiations, the Plaintiff and The California Group entered into an oral agreement (Subscription Agreement #1) whereby a corporation to be known as Hammond Technologies, Inc. (HTI) would be formed, with shares to be subscribed as follows:

The Plaintiff had subscription rights to 70 points or 70,000 shares, and The California Group had rights to 25 points or 25,000 shares, and 5 points or 5,000 shares were assigned to one Gary Klischam. The Plaintiff being entitled to this substantial portion of the corporation in exchange for raising capital to acquire the licensing rights for the benefit of HTI.

12. In the course of committing this oral agreement to writing, the Defendants, Evins, Case and Kramer, entered into an agreement of their own and prepared a Subscription Agreement which provided for a greatly different division of ownership than the one The California Group and the Plaintiff had entered into upon oral agreement in California.

13. Specifically, the Plaintiff's subscription was reduced to 35 points or 35,000 shares. The Defendants, Evins and Case, as agents for their law firm, took 6½ points or 6,500 shares and Kramer also took 6½ points or 6,500 shares. The California Groups subscription remained at 25 points or 25,000 shares.

14. Upon presentation of this new Subscription Agreement (Subscription Agreement #2) to the Plaintiff, Defendant Evins represented to the Plaintiff that The California Group insisted upon this allocation of a total of 13 point to the parties various attorneys and the the deal would not be accepted by The California Group unless the Plaintiff signed this new Agreement.

15. Defendant Evins represented that the Plaintiff would still have majority control under the new scheme, Defendant Evins represented to Plaintiff that 22 points or 22,000 shares had been set aside; 15 for capitalization of HTI and 7 for future management, over which the Plaintiff had voting control. The Defendants Evins and Case also assured the Plaintiff that the 6½ points or 6,500 shares, allotted to them, would always be voted with the Plaintiff's shares. Defendant Evins further represented to Plaintiff that this arrangement was for his benefit and did not require immediate payment.

16. These representations lead the Plaintiff to believe that he controlled 63½ points or 63,500 shares of the corporation.

17. In reliance upon the representations of Defendant, Evins, the Plaintiff signed Subscription Agreement #2, a copy of which is attached hereto as Exhibit "B" and the terms of which are incorporated herein.

18. Subsequently, the Plaintiff discovered that he did not in fact control a majority of the corporation and that under the terms of Subscription Agreement #2, which his own attorneys drafted, the 22 points were not controlled by him and the 15 points required a 80% vote and the 7 points required a 80% vote. The Plaintiff having actual control of only 35 points or 35,000 shares, could not even acquire the control which his attorneys had assured him he had.

19. Said representations were false and material to Plaintiff's decision to sign Subscription Agreement #2, which decreased his ownership and control by fifty (50%) percent.

20. The Plaintiff did in fact rely solely upon said representations in so signing such Agreement.

21. Said representations were made with the intention of inducing the Plaintiff to sign the Agreement. The Plaintiff did in fact sign the Agreement, and as a consequence and proximate result of the Defendants' actions, the Plaintiff suffered substantial damages, including loss of 35,000 shares of HTI, loss of control of HTI and its Board of Directors and a loss of 35% of the earnings of HTI.

22. In an effort to comply with the terms of his Option Agreement, the Plaintiff negotiated an Agreement with HTI and Michael Reese Hospital (MR), in Chicago, Illinois whereby MR would purchase the licensing rights to use one (1) of the lithrotriptor machines for the price of $1,200,000.00 and thereby permit Plaintiff to raise the capital required by his Option Agreement to purchase the licensing of the technology.

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23. In accordance with the terms of the Option, Plaintiff assigned his rights thereunder to HTI. With the October 22 Option deadline fastly approaching, the Plaintiff purchased an extension of the Option until 5:00 o'clock p.m. eastern-standard time, November 8, 1984 for $25,000.00.

24. The MR Agreement required, among other things, a $400,000.00 irrevocable letter of credit in favor of MR against which drafts could be made in certain specified circumstances.

25. Because of assurances given by the Defendants and upon information and belief as part of Defendants' plans, the Plaintiff's deadline to exercise the said Option was allowed to approach without a firm understanding as to raising the necessary capital.

26. As the $400,000.00 letter of credit was essential to consumation of the sale to MR, and thus essential to Plaintiff's exercise of his Option, the Plaintiff entered into an Agreement, dated November 6, 1984 with one Dr. Gerald Wallace. This Agreement will hereinafter be referred to as the Wallace Agreement, a copy of which is attached hereto as Exhibit "C" and the terms of which are incorporated herein.

27. The Wallace Agreement provided for the essential letter of credit, and was otherwise favorable to the Plaintiff as well as the California Group. Furthermore, it would have allowed Plaintiff to comply with the terms of his Option Agreement, provide HTI with the licensing rights to the technology and maintain Plaintiff's control over 35% of HTI.

28. To the detriment of the Plaintiff, Defendants, Evins and Case, refused to defend or even negotiate with the Wallace Agreement. Without reading one (1) word of the Wallace Agreement, Defendant, Evins criticized it, as well as the Plaintiff, and then began, with the assistance of Defendants, Case and Kramer, to intentionally prevent the Plaintiff from being able to maintain his ownership percentage

in HTI by allowing the November 8 deadline to pass and by representing to the Plaintiff that his Option has expired and he was "out of HTI".

29. By failing to act on Plaintiff's behalf, and making the above representations, the Defendants conspiring induced the Plaintiff to sign still another Subscription Agreement, (Subscription Agreement #3) the date of this Agreement being November 9, 1984. A copy of this Agreement is attached hereto as Exhibit "D".

30. The Plaintiff, relying on the representations of his attorneys, believed that his Option had in fact expired and the he no longer had any ownership rights in HTI. Based upon this belief, the Plaintiff signed the Subscription Agreement #3, whereby he was designated only 10 points or 10,000 shares in the corporation. Dr. Wallace, in exchange for the use of his letter of credit, was given 10 points or 10,000 shares as well. The Defendant, Evins, as agent for Butler Means, received 7½ points or 7,500 shares, a one (1) point gain from the last Subscription Agreement. Defendant, Kramer was also designated a greater portion, this time his share being 10½ points or 10,500 shares. The California Group was designated 35 points or 35,000 shares under this Agreement.

FOR A FIRST CAUSE OF ACTION

31. The Plaintiff reiterates the allegations contained in paragraphs 1 through 30 above as fully as if repeated herein verbatim.

32. Defendants made the following false representations to Plaintiff:

i The California group insisted on Agreement #2, particularly the allocation of 13,000 shares and would not go forward with the project unless Plaintiff signed that Agreement;

ii Under Subscription Agreement #2, Plaintiff would control a 63,500 share majority of HTI;

iii The 6,500 shares alloted to them would always be voted with Plaintiff's shares;

iv The terms of Subscription Agreement #2 were beneficial to Plaintiff; and

v The option had expired and Plaintiff was "out of HTI".

33. Defendants had knowledge of their falsity at the time said representations were made to Plaintiff.

34. The representations were each material to Plaintiff's decision to sign Subscription Agreement #2 and Subscription Agreement #3.

35. The representations were made with the clear intention of inducing Plaintiff to sign said Agreements.

36. Plaintiff was ignorant of the falsity of the representations and relied on their truth in his decision to sign said Agreements.

37. Plaintiff had a right to rely on the representations.

38. Plaintiff has been damaged as a direct and proximate result of Defendants' misrepresentations and is informed and believes that he is entitled to actual damages in excess of $6,500,000.00, and punitive damages in an amount to be determined at trial.

FOR A SECOND CAUSE OF ACTION

39. The Plaintiff herein reiterates the allegations contained in paragraphs 1 through 38 above as fully as if repeated herein verbatim.

40. Defendants as fiduciaries of Plaintiff, breached their duty to Plaintiff by:

i Fradulently inducing him to enter into Subscription Agreement #2, by way of false representations as set out in Paragraph 30 above and thereby decreasing Plaintiff's ownership from 70,000 shares to 35,000 shares;

ii Failing to represent and protect Plaintiff's interests in the negotiation process with the California Group and its lawyer, Defendant, Kramer;

iii Failing to negotiate for an extention of time of time for Plaintiff to fulfill the terms of the Option;

iv Failing to act on Plaintiff's behalf during the critical periods and prior to expiration of the Option;

v Failing to defend the Wallace Agreement which allowed

Plaintiff to fulfill his obligation and maintain control of his 35,000 shares of HTI;

vi Criticizing Plaintiff in the presence of his associates;

vii Representing to Plaintiff that his Option had expired and he was "out of HTI" and that unless he so agreed, inducing his to agree to give up an additional 25,000 shares of HTI by signing Subscription Agreement #3, and placing their interests above the interests of the Plaintiff, their client; and

viii Breaching the professional confidences of Plaintiff.

ix Puting their interest ahead of their client's interest.

41. As a consequence and proximate result of Defendants breaches of fiduciary duty to Plaintiff, Plaintiff has suffered actual damages in an amount in excess of $6,500,000.00 and punitive damages as may be determined at trial.

FOR A THIRD CAUSE OF ACTION

42. Plaintiff herein reiterates the allegations in paragraphs 1 through 41 above as fully as if repeated herein verbatim.

43. Defendants. Evins and Case, as Plaintiff's attorneys and counselors, owed a duty to Plaintiff to exercise reasonable care in advising Plaintiff to enter into Subscription Agreement #2 and #3, in drafting said Agreements, and in protecting Plaintiff's ownership and control of HTI and legal interests therein generally.

44. As planned with Defendant Kramer, Defendants Evins and Case negligently, wilfully and wantonly failed to carry out their duty to exercise reasonable care in their representation and counseling of Plaintiff with regard to the Agreements and in protecting Plaintiff's control of HTI and in fact put their own interest ahead of their client's interest.

45. As a consequence and proximate result of Defendants' negligence, gross negligence and wilfulness, Plaintiff has suffered actual damages in an amount in excess of $6,500,000.00 and punitive damages in an amount to be determined at trial.

FOR A FOURTH CAUSE OF ACTION

46. Plaintiff herein reiterates the allegations of paragraphs 1 through 45 above as fully as if repeated herein verbatim.

47. Defendants knowingly, and in combination by consented actions and with intent to injure Plaintiff, conspired among themselves to defraud, trick and manipulate the Plaintiff to deprive him of 60,000 shares of HTI and his majority control of HTI and to gain ownership of 13,000 shares for themselves. They did this by inter alia:

i Inducing Plaintiff by way of false representation to sign Subscription Agreement #2 which reduced Plaintiff's ownership from 70,000 shares to 35,000 shares and increased Defendants' ownership from 0 to 13,000 shares;

ii Inducing Plaintiff by way of false representations to sign Agreement #3 which further reduced Plaintiff's ownership from 35,000 shares to 10,000 shares and increased Defendants' ownership from 13,000 to 18,000 shares; and

iii Preventing Plaintiff from exercising his rights under the Option Agreement; and

iv By keeping Plaintiff from his lawful right to 70,000 shares;

48. As a consequence and proximate result of Defendants' acts of conspiracy, Plaintiff has suffered actual damages in an amount in excess of $6,500,000.00 and punitive damages in an amount to be determined at trial.

FOR A FIFTH CAUSE OF ACTION

49. Plaintiff herein reiterates the allegations contained in paragraphs 1 through 48 above as fully as if repeated herein verbatim.

50. At all times herein mentioned, Plaintiff was engaged in the practice of urology in the City of Spartanburg, and was largely dependant thereon for his livelihood and was, for the successful practice of his profession, largely dependant upon his good legal name and reputation for responsibility, honesty and integrity.

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51. In November 1984, Defendants, through Mr. Evins, maliciously published the following statements:

> i Gaines Hammond is a crazy, irrational and hysterical man;
>
> ii Gaines Hammond has committed fraud and acted in bad faith;
>
> iii Gaines Hammond is not capable of running HTI or handling any business matters at all;
>
> iv Gaines Hammond is irresponsible, dishonest, untrustworthy and he has done me (Defendant Evins) in; and
>
> v Gaines Hammond cannot handle pressure.

Each of the above statements was false and was meant to convey, and did convey to the persons to whom and among whom Defendant, Evins, published the same, the meaning that Plaintiff had not acted in good faith as a Shareholder of HTI, had acted irresponsibly, recklessly, unprofessionally and with the intent of running the corporation.

52. Defendant published the matters set forth above slandering Plaintiff for the purpose of exposing Plaintiff to contempt, hatred and redicule of those to whom and among whom the slanderous statements were published.

53. As a direct and proximate result of Defendant, Evins' publication of the false and defamatory matters Plaintiff has been injured in his reputation and practice of urology, and has suffered actual damages in in amount in excess of $6,000,000 and punitive damages in an amount to be determined at trial.

FOR A SIXTH CAUSE OF ACTION

54. Plaintiff herein reiterates the allegations contained in paragraphs 1 through 53 above as fully as if repeated herein verbatim.

55. The Defendants come within the prohabitions of the South Carolina

Unfair Trade Practices Act.

56. The acts as set out above individually and/or together are deceptive and unfair trade practices amounting to a violation of said Act.

57. Said actions were wilful, damaging Plaintiff in the amount of $6,500,000.00.

58. Because said acts were wilful, the Plaintiff is entitled to treble damages and attorneys' fees.

WHEREFORE, Plaintiff prays for judgment against the Defendants for actual damages of $6,500,000.00, for punitive damages, treble damages, attorneys' fees and costs as allowed.

LEWIS, BABCOCK, GREGORY & PLEICONES
A. Camden Lewis
Mary G. Foster

BY: _____
1529 Laurel Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000
Attorneys for the Plaintiff

Columbia, South Carolina

This the 12 day of March, 1986

OPTION FOR LICENSE AGR NT

Agreement made this _____ day of September 1984 between Errol Payne ("Payne"), Richard Penfil ("Penfil") and Charles McGregor ("McGregor"), collectively the "Inventors" and Gaines W. Hammond on the other part ("Optionee").

WHEREAS, Inventors have developed a system of improvements for the non-invasive lithotripting of certain kidney stones as more fully described on Exhibit A and hereinafter referred to as the "Invention"; and

WHEREAS, Optionee desires to obtain an option allowing Optionee to determine whether to enter into a license for its use.

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE I

OPTION GRANT AND CONSIDERATION

1.1. For the sum of $50,000 paid by Optionee to Inventors, receipt of which is hereby acknowledged, Inventors hereby grant Optionee an option to enter into the license agreement annexed as Exhibit B ("License Agreement"). The option shall extend from the date hereof until 5:00 p.m. pacific coast time on October 22, 1984 or such extended date as is determined in accordance with section 1.7 hereof.

1.2. Optionee shall have the right to extend this option to enter into the License Agreement until 5:00 p.m. pacific coast time on November 8, 1984 or such extended date as is determined

EXHIBIT A

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in accordance with section 1.7, upon payment to Inventors of $25,000 prior to the end of the period provided for in section 1.1.

1.3. Commencing September 24, 1984 and through the option period identified in section 1.1, Inventors shall make available to Optionee a prototype of the invention ("Prototype"), with the capability to lithotript simulations of kidney stones in phantoms simulating human beings (the "Capability"), such Prototype and Capability being more fully described in Exhibit C hereto. Commencing October 1, 1984 and through the option period identified in section 1.1, Inventors shall make the Prototype available to persons designated by Optionee, and conduct such use thereof as Optionee shall reasonably require to demonstrate the Capability. The purpose of such demonstrations shall be to obtain funding for the enterprise intending to exercise the option. Inventors shall have the right not to demonstrate or otherwise give access to the Prototype to any person or entity who they reasonably believe is not interested in providing such funding but primarily is interested in obtaining access to the Prototype for competitive or other purposes. In the event this option is extended as provided for in section 1.2, the access and demonstrations provided for in this section shall continue through the end of the extended option period provided for in section 1.2. The Prototype shall be made available at such site within the continental United States as Inventors may reasonably determine.

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1.4 During the period of the option, Inventors shall make available to Optionee all information regarding the Invention that Optionee reasonably requires to evaluate the Invention and which is in the possession of Inventors; provided Inventors shall have no obligation to make available confidential proprietary information of Inventors which is not reasonably required to evaluate the Invention and if required no such information need be provided until Optionee has entered into a confidential non-disclosure agreement with Inventors reasonably acceptable to Inventors in the exercise of their reasonable judgmen

1.5. A condition to Optionee's exercise of this option shall be:

(a) Optionee obtaining the written consent of Inventors to a plan to capitalize the enterprise which is to be the licensee under the License Agreement, Inventors agreeing that they will consent to any plan of capitalization which provides for such enterprise to have, a net worth (excluding the value of the License Agreement) of not less than $2,000,000 within six months from the Commencement Date (as hereinafter defined) and not less than $4,000,000 within one year from such date;

(b) Optionee's consent to an agreement proposed by Inventors for the limited marketing rights for devices incorporating the Invention, of Gary P. Clish or an entity designed by him and acceptable to

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(c) Licensee under the License Agreement* entering into a Sublicense Agreement in the form annexed hereto as Exhibit D.

Inventors may in their sole discretion waive any of the conditions contained in this Section 1.5.

1.6. The option shall be exercised by delivery to Inventors of two copies of the License Agreement duly executed by Optionee or a corporation meeting the requirements of section 1.8.

1.7. All payments for the option shall be made in cash or by unendorsed certified check drawn on a bank which is a member of the Federal Reserve System and made payable to and delivered to Payne. No portion of the payments made by Optionee to Inventors to obtain or extend this option shall under any circumstances be refundable or othewise due by Inventors to Optionee unless Inventors have not made the Prototype with the Capability available to Optionee by October 1, 1984 or extended the option period for one day for each day by which they are delinquent in providing such availability and upon failure of Inventors to provide such availability or to extend the option and in any event if such availability is not provided by October 9, 1984, Optionee may cancel this option and shall receive from Inventors a return of the full option price paid to Inventors. Without limiting the foregoing, the inability to obtain patent protection for the Invention, its infringement of the patent or other proprietary rights of others, its failure to comply with applicable laws or regulations or to be safe, or, except as provide in the preceding sentence, its lack of efficaciousness, shall give Optionee no right to return of any sum paid hereunder.

of the exercise of the option.

ARTICLE 11

GENERAL PROVISIONS

2.1. This option shall inure to the benefit of and be binding upon the legal representatives of the parties. Except as provided in Section 1.8, neither party may assign its rights or duties under this Agreement without the prior written consent of the other party.

2.2. Any notice, other communication or document to be delivered under this option shall be in writing duly executed by the party giving it and shall be deemed given only when actually delivered to the other party or three days after being deposited in the U.S.A. mail, registered or certified mail return receipt requested, postage prepaid, and addressed as follows:

(a) If to Inventors:

Errol Payne
c/o Design West
2532 Dupont Drive
Irvine, California 92715

(b) If to Optionee:

c/o Thomas A. Evins, Esq.
Butler, Means, Evins & Browne
Lawyers Building
208 Magnolia Street
Spartanburg, South Carolina 29304

or to such other address or addressee as a party may designate by written notice given in accordance with this provision.

any subsequent default under the same provision or a waiver of default under any other provision of this Agreement.

2.4. Each right, power and remedy provided herein or now or hereafter existing at law, in equity, by statute or otherwise shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for herein or now or hereafter existing at law, in equity by statute or otherwise, and the exercise or beginning of exercise or forebearance of exercise by any party of any one or more of such rights, powers or remedies, shall not be deemed a waiver by such party of any or all such other rights.

2.5. This Agreement constitutes the entire agreement of the parties with respect to the subject matter of this Agreement and supersedes any prior agreement between them whether written or oral and cannot be altered, modified or discharged orally but only by an agreement in writing signed by each of the parties hereto, or their heirs or legal representatives.

2.6. This Agreement may be executed in multiple original counterparts, each of which shall for all purposes be deemed original and all of such counterparts shall together constitute but one and the same Agreement.

2.7. This Agreement shall be interpreted under and construed in accordance with the law of the State of California.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the date first set forth above.

Gaines W. Hammond

Ethel Payne

Richard Penfil

Charles McGregor

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SUBSCRIPTION AGREEMENT

This Subscription Agreement is made as of August 30, 1984.

1. The undersigned hereby agree to form a Delaware Corporation for which the name Hammond Technology, Inc. ("Newco") shall be sought, and to subscribe to the number of shares of its common stock set forth below at $1.00 per share. Payment for the shares shall be made within 60 days from the date hereof and no shares shall be issued to an undersigned until he has paid for his shares in full. Newco shall be formed to commercialize rights to technologies for the non-invasive treatment of kidney stone and similar ailments.

NAME AND ADDRESS OF SUBSCRIBER	NUMBER OF SHARES
(a) Gaines W. Hammond Jr., M.D. 145 Dillon Drive Spartanburg, South Carolina 29302	35,000
(b) Errol Payne c/o Design West 2532 Dupont Drive Irvine, California 92715	10,000
(c) Richard Penfil M.D. P.O. Box 5660 Balbou Island, California 92662	10,000
(d) Charles McGregor c/o Design West 2532 Dupont Drive Irvine, California 92715	5,000
(e) Thomas A. Evins, Esq. as agent for Butler,Means,Evins & Browne 205 Magnolia Street Spartanburg, South Carolina 29304	6,500

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EXHIBIT B

11 East 44th Street
New York, New York 10017

(g) Gary P. Clisham*

(h) David Blunt*

(i) Tom Gardner*

2. The undersigned hereby reserve from the authorized but unissued common stock of Newco the following shares for the following purposes, such reservation to continue until holders of not less than 85% of the shares of Newco's capital stock outstanding, vote or consent to terminate such reservation:

(a) 15,000 common shares for a private placement to raise $5,000,000 in gross proceeds; and,

(b) 7,000 shares to underlie an Incentive Stock Option Plan meeting the requirements of the Internal Revenue Code, to be adopted by Newco.

3. Newco's capital shall consist solely of common shares of which 1,000,000 shares, par value 10¢ each, shall be authorized. The shares subscribed by Errol Payne, Richard Penfil and Charles McGregor (hereinafter, "Put Holders"), shall in the aggregate represent not less than 25% of the oustanding shares of Newco (a)

*In the aggregate 5000 shares to be allocated by Clisham; addresses to be furnished.

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until it has a ~e worth, determined in a[illegible]ance with the definition contained in paragraph 7 (d) hereof, of not less than $4,000,000 and (b) until its common stock is traded on an exchange registered with the Securities and Exchange Commission ("SEC") or on the NASDAQ or any successor system. Accordingly, until both such conditions are met, no shares of Newco's capital stock shall be issued beyond those subscribed hereunder, outright or on exercise of options or on conversion of convertible securities, unless simultaneously, sufficient additional shares are issued without additional cost to the owners of the shares issued to Put Holders hereunder in order to maintain their percentage of total capital shares at 25%. The requirement of condition (b) shall be deemed met if the required trading commences within five business days of the issuance of additional shares. The terms of this anti-dilution provision, shall be included in the certificate of incorporation of Newco.

4. In the event that within two years from the Commencement Date, as defined in paragraph 15, Newco has not consummated a sale of its common stock to the public through a registration statement declared effective by the SEC for gross proceeds of not less than $5,000,000, or entered into a business combination or sold substantially all its assets to a company whose securities are listed for trading on a stock exchange registered with the SEC or traded through the NASDAQ or any successor system, then the holders ("Holders") of the securities subscribed by Put Holders or any securities of Newco received by virtue of the ownership of such securities ("Option Securities") shall have the right at anytime until the results of operations for Newco for the two full fiscal

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years of Newco completed after such two year period following the Commencement Date are delivered to Holders, to put their Option Securities to Newco for cash consideration equal to the Formula Price. The Formula Price shall be the greater of (a) two times the average gross receipts of Newco in the two fiscal years of Newco prior to exercise of the put, in which Newco had the highest gross receipts, or (b) Newco's net worth, in each case multiplied by the ratio of the Option Securities put to Newco's outstanding capital stock with the result reduced by twenty percent of the costs to Newco of litigation paid or accrued as of the date Holder exercises his put multiplied by the ratio of the Option Securities put to Newco's outstanding capital stock. Gross receipts and net worth shall be determined in accordance with generally accepted accounting principles; provided however gross receipts shall exclude any sum received from a transaction in which Newco's receipts are equal to or less than its costs of the transaction and with regard to any transaction entered into with Gary P. Clisham or an entity designated by Clisham and acceptable to Put Holders, gross receipts shall include only the difference between the total receipts of Newco less its direct costs relating thereto.

5. Newco agrees that it shall apply for key man insura in the amount of $2,000,000 naming Newco as the beneficiary in the event of the death of Hammond. Hammond agrees to cooperate in applying for such insurance. Newco shall also seek officers and directors insurance in the amount of $2,000,000. The insuran provided for in this paragraph shall not be discontinued except upon the vote or consent of the holders of 85% or more of the

shares of Newco's capital stock outstanding.

6. Hammond, Payne and Penfil agree to be directors of Newco; provided however Payne and Penfil shall not be obligated to commence being directors until Newco has obtained officers and directors insurance and shall not be obligated to continue as directors for a period of more than one year beyond the term they commence serving as directors.

7. (a) After Newco's net worth, determined in accordance with generally accepted accounting principles, exceeds $5,000,000, of which not less than $1,000,000 has been provided from retained earnings, any net worth in excess of such $5,000,000 which is composed of retained earnings and which does not reduce the retained earnings portion of net worth below $1,000,000, shall be distributed periodically to shareholders, not less frequently then semi-annually unless the holders of shares representing not less than 85% of the shares of Newco's capital stock outstanding, vote or consent otherwise. (b) Newco's expenses in any fiscal year shall not exeed the percentage of its gross receipts, as reflected below, nor shall its capital expenditures, except for the purpose of creating inventory for sale to customers, exceed 5% of its gross receipts until gross receipts exceed $10,000,000 or when gross receipts exceed $10,000,00 be greater than the larger of $500,000 or 3% of such gross receipts in any of its fiscal years, in each case unless the holders of not less than 85% of the shares of its capital stock outstanding, vote or consent otherwise. (c) Retained earnings, capital expenditures and inventory shall each be determined in accordance

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shall have the meaning assigned in paragraph 4 hereof. (d) Net worth shall be determined in accordance with generally accepted accounting principles except there shall be excluded therefrom the unamortized portion of any rights in, or to the use of, United States or foreign patents or other proprietary rights in the form of intelectual property. (e) Expenses shall be determined in accordance with generally accepted accounting principles except no extraordinary expenses shall be included. Extraordinary Expenses shall mean expenses for the public or private placement of Newco's securities, the expenses of litigation and other non-operating expenses which are not contemplated to be incurred on a regular basis.

	Percentage of Gross Receipts Authorized for Expenses
Fiscal year in which Newco has sold or otherwise placed in service five or fewer devices for the non-invasive treatment of kidney stone or similar ailments.	80%
Fiscal year in which Newco has sold or otherwise placed in service six devices for the non-invasive treatment of kidney stone or similar ailments.	75%
Fiscal year in which Newco has sold or otherwise placed in service seven devices for the non-invasive treatment of kidney stone or similiar ailments.	70%
Fiscal year in which Newco has sold or otherwise placed in service eight devices for the non-invasive treatment of kidney stone or similar ailments.	65%
Fiscal year in which Newco has sold or otherwise placed in service nine devices for the non-invasive treatment of kidney stone or similar ailments.	60%

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or otherwise ... in service 10 or more devices ...or the non-invasive treatment of kidney stone or similar ailments.

8. Newco's Certificate of Incorporation shall provide that it may not be amended except upon the vote or consent by the holders of not less than 85% of the shares of its capital stock outstanding. Such Certificate of Incorporation shall also reflect the requirements for greater than majority shareholder vote or consent reflected herein.

9. The requirements for greater than majority shareholder voting or consent provided for in paragraphs 2, 7, 8 and 11 shall terminate at such time as Newco has consummated a sale of its common stock to the public through an SEC registered offering.

10. Hammond agrees that in the event he enters into any option for or obtains any rights or invents any technology applicable to the non-invasive treatment of kidney stone or similar ailments, he will contribute his option, rights or invention to Newco.

11. Hammond agrees to prepare a comprehensive business plan for Newco's first two years of operations by not later than five weeks after the date when Newco first acquires any rights to technology for the non-invasive treatment of kidney stone and similar ailments. The approval of Put Holders shall be required prior to implementation of the business plan and Put Holders agree not to unreasonably withhold their consent thereto. No material deviation from the business plan as approved shall be made except

shares of capital stock of Newco outstanding at the time such vote or consent is sought. Subscribers agree that within three weeks from the date of this Agreement the subscribers listed at letters (a)-(f) of paragraph 1 shall hold preliminary discussions for the purpose of agreeing on the general business strategies of Newco to be employed prior to implementation of the business plan and Hammond agrees to cause Newco to be operated in accordance with such business strategy pending implementation of the business plan.

12. Newco shall not commence any activity for the sale of its securities through a public offering registered with the SEC or for any business combination or sale of substantially all of its assets unless the consent thereto is obtained from the Put Holders and if elected by Put Holders, Put Holders shall have the right to appoint a representative to manage the activities of Newco in connection with either who is acceptable to Hammond in the exercise of reasonable judgment. Put Holders agree not to unreasonably withhold consent to proposals for public offerings, business combinations and sales of assets. Put Holders hereby consent to any public offering that raises not less than $6,666,000 gross proceeds for not more than 20% of the common stock of Newco to be outstanding after consummation of such public offering.

13. Each subscriber represents and acknowledges to Newco and each of the other subscribers as follows:

(a) Subscriber understands that he is an initial purchaser of Newco's securities, and that none are now outstanding.

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and is not now actively engaged in business.

(c) Subscriber understands that Newco will be required to raise substantial funds in order to be able to commence business and that there is no assurance that it will be successful in such undertaking.

(d) Subscriber has been involved in the initiation of Newco and its proposed activities and has worked with the other persons so involved who are also initial subscribers and, accordingly, Subscriber has had access to all information relevant to an investment decision as to the shares of Newco.

(e) Subscriber understands that the shares he is to receive are restricted, are not registered with the SEC or qualified under applicable state law and that his investment will be illiquid for an indeterminate period of time. Subscriber is taking these shares for investment, solely for his own account, not with a view to distribution, and understands that the shares will be subject to an investment letter, the content of which will be determined solely by Newco which will reflect the facts stated in this subparagraph and provide for restriction on resale of these shares.

(f) Subscriber understands that for the reasons hereinbefore stated and due to the risks associated with companies having no prior operating history, his

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has sufficient net worth and sufficient liquid assets to sustain such a loss without hardship.

(g) Subscriber understands that if full payment is not made for his shares within sixty days from the date hereof, the Board of Directors of Newco may at anytime thereafter cancel his purchase, return any payment he has made and Subscriber agrees in that event he shall have no rights to any of the capital stock of Newco and no claim against Newco related thereto.

14. Subscribers agree that Hammond and Put Holders shall jointly select certified public accountants to be employed by Newco, provided such accountants shall be chosen from among those who are generally available in the location of the principal office of Newco. Any Subscribers who are also directors of Newco agree to vote as directors to carry out the intent of this provision. This provision shall be of no further force or effect after Newco has consummated a sale of its securities to the public through an SEC registered offering.

15. As used in this Agreement the term "Commencement Date" shall mean the earlier of:

(a) The date on which the first device for the non-invasive treatment of kidney stones in which Newco has any rights is first utilized to treat human patients; or

(b) the date such device could have been used for the treatment of human patients under the Federal Food Drug and Cosmetic Act or applicable state law and the regulations promulgated under each.

16. This Subscription Agreement shall be effective when executed by Subscribers identified at letters (a)-(f) of paragraph 1.

IN WITNESS WHEREOF the parties hereto have executed this Subscription Agreement as of the date first set forth above.

Gaines W. Hammond Jr. M.D.
Gaines W. Hammond Jr. M.D.

Errol Payne

Richard Penfil M.D.

Charles McGregor

Thomas A. Evins
Thomas A. Evins, Esq.

Alan S. Kramer, Esq.

Gary P. Clisham

David Blunt

Tom Gardner

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LETTER OF AGREEMENT

THIS LETTER OF AGREEMENTis entered into on this the sixth day of November, 1984, by and between Dr. Gerald L. Wallace (hereinafter called Wallace) and Dr. Gaines W. Hammond, Jr., and Hammond Technologies, Inc.,a Delaware corporation (who are jointly hereinafter referred to as Hammond), for the mutual benefit, considerations, and agreements set forth below:

1. Dr. Gaines W. Hammond, Jr., M.D., is currently the owner of 57% of the issued, outstanding, and unencumbered stock of Hammond Technologies, Inc. a Delaware corporation. Hammond hereby gives to Wallace, or Wallace's designee, the option to purchase 28 1/2% of the outstanding, issued, and unencumbered stock of Hammond Technologies, Inc., a Delaware corporation, for the purchase price of One Million and No/100 ($1,000,000.00) Dollars. Such option may be exercised by Wallace within thirty (30) days of the date of this Letter of Agree Upon this option being exercised by Wallace the sum of Five Hundred Thousand and No/100 ($500,000.00) Dollars shall be paid to Dr. Gaines W. Hammond, Jr. at closing and the balance of Five Hundred Thousand and No/100 ($500,000.00) Dollars shall be paid six (6) months from th date of closing. The date of closing shall be on a date to be mutual agreed upon by Wallace and Hammond within ninety (90) days of the dat of this Letter of Agreement.

2. Wallace agrees to furnish, or secure the furnishing of, a Letter of Credit in the sum of Four Hundred Thousand and No/100 ($400,000.00) Dollars to assist in the sale of one I.D.E. lithotripte

machine to Michael Reese Hospital in Chicago, Illinois. The terms of such Letter of Credit are to be mutually agreed upon by Wallace and Hammond.

3. It is agreed that when a second I.D.E. lithotripter machine is sold to a third party (other than either Wallace or Hammond) that from the sale price of such second I.D.E. lithotripter machine the sum of Four Hundred Thousand and No/100 ($400,000.00) Dollars shall be deposited in an escrow account to secure the requirements of the Michael Reese Hospital sale and upon such escrow account being established that the Letter of Credit referred to in paragraph 2 above will be released and of no further force or effect.

4. Wallace, or Wallace's designee, shall have the right and options to purchase the following machines:

a. Five I.D.E. machines are proposed to be manufactured initially. The first of those five I.D.E. machines will be the machin purchased by Michael Reese Hospital in Chicago, Illinois. Wallace, or Wallace's designee, shall have the right and option to purchase the second of such five initial I.D.E. machines.

b. It is further anticipated that a second five I.D.E. machines will be manufactured (i.e., machines numbered 6 through 10) within the reasonable future. Wallace, or Wallace's designee, shall have the right and option to purchase two of such second five machines.

c. After the initial ten I.D.E. machines it is anticipated that additional machines (hereinafter called "PMA Machines") shall be manufactured. Wallace, or Wallace's designee, shall have the right and option to purchase two of such PMA Machines.

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d. In exercising the options to purchase all the machines referred to paragraphs a, b, and c, above, Wallace shall serve as a wholesaler and shall have the right to purchase such machines for the wholesale cost equal to the actual cost of manufacturing and producing such machines. It is agreed that Wallace may then sell such machines at a retail price to be not less than $800,000.00 per machine.

5. It is understood that the location for the manufacturing of the I.D.E. and PMA machines and the site for the location of the principal office of Hammond Technologies, Inc. has not yet been determined. Wallace and Hammond agree to explore all viable options to determine the location of the best site for the manufacturing of such machines and for the principal business office of such corporatio

6. It is agreed that not more than one I.D.E. machine or one PMA machine shall be located within any geographic area consisting of a 200 mile radius of the location of each such machine. Provided, how that Wallace shall be exempt from such 200 mile radius limitation and may place more than one of any such machine within any given 200 mile goegraphic radius if, in Wallace's sole judgment, patient needs justif the placement of more than one such machine within any given 200 mile radius.

7. It is agreed, in principle, that a separate entity, yet to be determined, will be formed for the purpose of supplying software and metabolic evaluation and follow-up care for patients who utilize the services of the I.D.E. and PMA machines. At the present time it is contemplated that the name of such separate entity may be Nephrocare and that the services furnished by such separate entity will be on a

contract basis through Hammond Techonologies, Inc. It is further agreed that Dr. Gerald L. Wallace and Dr. Gaines W. Hammond, Jr., shall determine the ownership and organization of such separate entity.

8. It is understood that Hammond Technologies, Inc. is or may be in the need of securing operating capital. Wallace agrees to assist in locating a viable source of financing operating capital for Hammond Techonologies, Inc. in the range of apprxoimately $500,000.00.

9. It is understood that Dr. Gaines W. Hammond, Jr. has incurred travel and legal expenses in a sum estimated to be approximately $25,000.00 to $30,000.00 in the pursuit of the business interest of Hammond Techinologies, Inc. It is agreed that Dr. Gaines W. Hammond, Jr. shall be reimbursed such out-of-pocket expenses incurred by him prior to the date of this Letter of Agreement out of the operating capita of Hammond Technologies, Inc. The reimubrsement of such expenses is to be supported by vouchers of other documents submitted by Dr. Gaines W. Hammond, Jr., in support of such expenses incurred.

10. It is recognized that at the present time that Dr. Gaines W. Hammond, Jr. is the sole and exclusive owner of 57% of the issued, outstanding, and unencumbered stock of Hammond Techonologies, Inc. 28 1/2% of such stock is subject to Wallace's option given in paragraph 1 above. As to the remaining 28 1/2% of Dr. Gaines W. Hammond, Jr.'s stock, the following rights and options shall apply:

a. At the end of eighteen months from the date of this Letter of AgreementDr. Gaines W. Hammond, Jr. shall have the option to sell to Wallace, or Wallace's designee, all of Dr. Gaines W. Hammond, Jr.'s remaining 28 1/2% of the outstanding, issued, and unencumbered

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stock of Hammond Technologies, Inc. Upon the exercise of such option to sell by Dr. Hammond, Wallace, or Wallace's designee, shall have the obligation to purchase such outstanding 28 1/2% of said stock at the purchase price hereinafter set forth.

b. At the end of eighteen months from the date of this Lett of Agreement Dr. Gerald L. Wallace, or his designee, shall have the option to purchase all of Dr. Gaines W. Hammond, Jr.'s remaining 28 1 of the outstanding, issued, and unencumbered stock of Hammond Technologies, Inc. Upon the exercise of this option to purchase by Dr. Walalce, or Wallace's designee, Dr. Hammond shall have the obligation to sell such outstanding 28 1/2% of said stock at the purchase price hereinafter set forth.

c. In the event neither of the eighteen month options set forth in paragraph a or paragraph b above is exercised, then at the end of twenty-four months from the date of this Letter of Agreement Dr. Gaines W. Hammond, Jr. shall have the option to sell to Wallace, Wallace's designee, all of Dr. Gaines W. Hammond, Jr.'s remaining 28 of the outstanding, issued, and unencumbered stock of Hammond Technologies, Inc. Upon the exercise of such option to sell by Dr. Hammond Wallace, or Wallace's designee, shall have the obligation to purchase such outstanding 28 1/2% of said stock at the purchase price hereinafter set forth.

d. In the event neither of the options referred to in paragr a or b above is exercised, then at the end of twenty-four months fro the dateof this Letter of Agreement Dr. Gerald L. Wallace, or his desig

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shall have the option to purchase all of Dr. Gaines W. Hammond, Jr.'s remaining 28 1/2% of the outstanding, issued, and unencumbered stock of Hammond Technologies, Inc. Upon the exercise of such option to purchase by Dr. Wallace, or his designee, Dr. Hammond shall have the obligation to sell such outstanding 28 1/2% of said stock at the purchase price hereinafter set forth.

e. The purchase price for such 28 1/2% of the stock of Hammond Technologies, Inc., upon the exercise of any of the above options, shall be equal to the net earnings of Hammond Technologies, I: times seven, times 28 1/2%. The purchase price is to be paid in cash upon closing and the closing is to be held on a mutually agreeable date within ninety days of the date of the exercise of such option.

WITNESS:

_____ _____

DR. GERALD L. WALLACE

WITNESS: HAMMOND TECHNOLOGIES, INC.

_____ By: _____

GAINES W. HAMMOND, JR., M.D.
Its President

WITNESS:

_____ _____

DR. GAINES W. HAMMOND, JR., individual

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SUBSCRIPTION AGREEMENT

This Amendment to Subscription Agreement is made as of November 9, 1984.

1. The undersigned (other than Gerald L. Wallace) have caused the formation of a Delaware Corporation named Hammond Technologies, Inc. ("HTI"), subscribed to its capital stock and entered into certain other agreements in a subscription agreement made as of August 30, 1984. The signatories thereto hereby abrogate the August 30, 1984 subscription agreement and with Wallace enter into this Agreement intending thereby to also abrogate all prior agreements and arrangements, whether or not binding on the parties, between Gaines W. Hammond, HTI and Gerald L. Wallace including specifically the latter agreement dated November 6, 1984 between Gaines W. Hammond, HTI and Gerald L. Wallace and subsequent documentation by or on behalf of any such parties preceding the date of this Agreement. This agreement contains the only agreements of the parties with respect to HTI and the Technology as defined below.

2. HTI has been formed to commercialize rights to technologies for the non-invasive treatment of kidney stones and similar ailments. For that purpose HTI desires to enter into a license agreement as the successor to the rights of Gaines W. Hammond under an agreement with Errol Payne, Richard Penfil and Charles McGregor dated September 10, 1984 (the "Option Agreement").

EXHIBIT D

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Such license is annexed to the Option Agreement as Exhibit B (the "License Agreement"). The License Agreement pertains to a certain extracorporeal shock wave lithotripsy technology ("Technology"). Upon entering into the License Agreement HTI intends to utilize the Technology, subject to applicable law, to commercialize devices based thereon (the "Device" or "Devices"). The parties agree that the Option Agreement has terminated persuant to its terms, however Payne, Penfil and McGregor agree that by execution of this Subscription Agreement, directly or through their attorney-in-fact, they hereby acknowledge the right of HTI to enter into the License Agreement, which upon being executed on behalf of HTI, shall be binding upon them in accordance with its terms.

3. Hammond paid to Payne, Penfil and McGregor the sum of $75,000 pursuant to the Option Agreement. HTI agrees as follows with respect thereto.

(a) Within 10 days of the consummation of an agreement between HTI, Michael Reese Second Century Foundation and Michael Reese Hospital and Medical Center dated on or about November 12, 1984, for the sale by HTI of a Device and for other purposes ("MRH Agreement"), HTI shall pay to Hammond the sum of $25,000.

(b) Ten days after receipt of the proceeds from the sale of the third Device after issuance of an FDA Investigational Device Exemption ("IDE"), and ten days after receipt of the proceeds from the sale of the fifth Device after issuance of an IDE, HTI shall in each instance pay to Hammond the sum of $20,000 for a total of $40,000.

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(c) The remaining balance paid by Hammond under the Option Agreement, namely the sum of $10,000 may be applied in fulfillment of his subscription payment obligations hereunder.

4. Wallace agrees to procure a Letter of Credit ("Letter of Credit") not later than noon EST, November 12, 1984 from First National Bank of Mobile, Alabama ("Bank"), in the form annexed hereto as Exhibit A, with Michael Reese Second Century Foundation as beneficiary for which HTI shall be the applicant and which will be guaranteed by Wallace.

5. In consideration of the performance by Wallace of the provisions of paragraph 4, HTI agrees that Wallace or his designee shall have a right of first refusal to purchase the first Device sold after HTI's Devices have received an IDE. HTI will offer such a Device for a sale price not exceeding $800,000 and on such other terms as HTI determines. Such terms shall be available for Wallace to accept for a period of ten days after being provided to him. Notwithstanding the preceding, HTI shall not be required to offer such right of first refusal to Wallace in the event Michael Reese Second Century Foundation should object to the placement of the first Device as directed by Wallace, under the provisions of section 7.7 of the MRH agreement.

6. Further HTI agrees that from proceeds of the first sale of a Device after the issuance of an IDE, whether or not to Wallace, HTI shall deposit $400,000 with the Bank or such lesser sum as is required to procure the release of Wallace as a guarantor of the Letter of Credit.

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7. The undersigned hereby subscribe to the number of shares of common stock of HTI set forth below at $1.00 per share. Payment for the shares shall be made within 20 days from the date hereof and no shares shall be issued to an undersigned until he has paid for his shares in full.

	NAME AND ADDRESS OF SUBSCRIBER	NUMBER OF SHARES
(a)	Gaines W. Hammond Jr., M.D. ("Hammond") 145 Dillon Drive Spartanburg, South Carolina 29302	10,000
(b)	Errol Payne ("Payne") c/o Design West 2532 Dupont Drive Irvine, California 92715	10,000*
(c)	Richard Penfil M.D. ("Penfil") P.O. Box 5660 Balboa Island, California 92662	20,000*
(d)	Charles McGregor ("McGregor") c/o Design West 2532 Dupont Drive Irvine, California 92715	5,000*
(e)	Thomas A. Evins, Esq. as agent for Butler, Means, Evins & Browne 205 Magnolia Street Spartanburg, South Carolina 29304	7,500
(f)	Alan S. Kramer, Esq. 11 East 44th Street New York, New York 10017	10,500
(g)	Gerald L. Wallace 3715 Dauphin Street Suite 7e Mobile, Alabama 36608	10,000

*or between such three parties as they determine including adding John Chandronait as a subscriber.

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(h) Gary Clisham*

(i) David Blunt*

(j) Tom Gardner*

8. No shareholder of HTI shall have any preemptive rights nor otherwise be protected against dilution of his interest in its capital stock; provided however HTI shall not issue any of its securities to any of its shareholders unless all shareholders are offered an opportunity to purchase such securities of the corporation on the same terms, or a percentage of such securities on the same terms equal to their then percentage interest in the capital stock of HTI should shareholders in the aggregate desire to purchase a greater number of such securities than are offered. This provision shall terminate at such time as any of the capital stock of HTI has been registered with the Securities and Exchange Commission and shall not apply to Securities issued pursuant to section 9(b).

9. The undersigned hereby reserve from the authorized but unissued common stock of HTI the following shares for the following purposes.

(a) 15,000 common shares for a private placement to raise up to $5,000,000 in gross proceeds; and,

* In the aggregate 5000 shares to be allocated by Clisham; addresses to be furnished.

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(b) 7,000 shares to underlie an Incentive Stock Option Plan meeting the requirements of the Internal Revenue Code, to be adopted by HTI.

10. Each subscriber represents and acknowledges to HTI and each of the other subscribers as follows:

(a) Subscriber understands that he is an initial purchaser of HTI's securities, and that none are now outstanding.

(b) Subscriber understands that HTI has no history and is not now actively engaged in business.

(c) Subscriber understands that HTI will be required to raise substantial funds in order to be able to commence business and that there is no assurance that it will be successful in such undertaking.

(d) Subscriber has either been involved in the initiation of HTI and its proposed activities and has worked with the other persons so involved who are also initial subscribers or has conducted such investigation of HTI and its prospects and affairs, including the opportunity to question the other subscribers, as he deemed appropriate and, accordingly, Subscriber has had access to all information relevant to an investment decision as to the shares of HTI and the other provisions hereof.

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(e) Subscriber has reviewed the terms of the Option Agreement with its exhibits including the License Agreement and Sublicense Agreement between HTI and Medstone, Inc. and the terms of the November 9, 1984 draft of the MRH Agreement. The agreements of Subscriber hereunder are made in light of the terms thereof.

(f) Subscriber understands that the shares he is to receive are restricted, are not registered with the SEC or qualified under applicable state law and that his investment will be illiquid for an indeterminate period of time. Subscriber is taking these shares for investment, solely for his own account, not with a view to distribution, and understands that the shares will be subject to an investment letter, the content of which will be determined solely by HTI which will reflect the facts stated in this subparagraph and provide for restriction on resale of these shares.

(g) Subscriber understands that for the reasons hereinbefore stated and due to the risks associated with companies having no prior operating history, his entire investment and the other undertakings of HTI hereunder may become worthless. Subscriber has sufficient net worth and sufficient liquid assets to sustain such a loss without hardship.

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(h) Subscriber understands that if full payment is not made for his shares within twenty days from the date hereof, the Board of Directors of HTI may at anytime thereafter cancel his purchase, return any payment he has made and Subscriber agrees in that event he shall have no rights to any of the capital stock of HTI and no claim against HTI related thereto.

11. This Subscription Agreement shall be effective when executed by Subscribers identified at letters (a)-(g) of paragraph 7.

IN WITNESS WHEREOF the parties hereto have executed this Subscription Agreement as of the date first set forth above.

Gary P. Clisham

David Blunt

Tom Gardner

Hammond Technologies, Inc.

By: Gaines W. Hammond Jr. M.D.

Gaines W. Hammond Jr. M.D.

Errol Payne

Richard Penfil M.D.

Charles McGregor

Thomas A. Evins, Esq.

Alan S. Kramer, Esq.

Gerald L. Wallace

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(3)

No. 90-417

Supreme Court, U.S.
FILED
OCT 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALAN S. KRAMER,

Petitioner,

—v.—

GAINES W. HAMMOND, JR.,

Respondent.

PETITIONER'S REPLY BRIEF

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Dated: October 19, 1990

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STATEMENT

The Brief in Opposition argues the merits of Hammond's claims, and makes three legal arguments not addressed by the petition. First, Hammond accuses Kramer of raising a new constitutional issue for the first time in this Court. Second, he claims that the standard of proof applied by a state court in deciding a Rule 12(b)(2) motion does not raise due process concerns. Third, Hammond asserts a conspiracy theory, which was argued to, but not relied on by, the courts below, as a basis for affirming the decision of the South Carolina Supreme Court. Each of these arguments is without merit.

ARGUMENT

Kramer Raised the Same Constitutional Issue Below

Hammond claims that Kramer is raising for the first time in this Court the appropriate burden of proof on a jurisdiction testing motion. (Brief In Opp., at 21 & n.13.)

Kramer asked the South Carolina Supreme Court to review the entire discovery record, including evidence adduced in opposition to jurisdiction, in deciding whether plaintiff established minimum contacts under the due process clause. By applying a *prima facie* standard to Kramer's 12(b)(2) motion, the court below ignored substantial record evidence showing the absence of minimum contacts. Most courts have improperly held that, even after substantial discovery, "a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion [to dismiss]." *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). The petition asks the Court to correct this erroneous view.

The most that can be said for Hammond's argument is that Kramer did not attach the label "preponderance of evidence" to his argument below. He did, however, ask the court to adopt the standard represented by that label in ruling on his due process claim. Thus, the question presented here was fairly presented below.

Moreover, the leading treatise on practice before this Court states:

> There is . . . a degree of flexibility allowed counsel with respect to the federal questions properly presented to the Court. The parties "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed," and the parties may enlarge upon the questions they do present as long as the enlargement may be deemed fairly included or comprised within the stated questions.

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 3.24, at 164 (6th ed. 1986) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)). In addition, concurring in *Illinois v. Gates*, 462 U.S. 213 (1983), Justice White plainly recognized a distinction between "the raising of constitutional claims and the making of arguments in support of or in opposition to those claims." *Id.* at 248 (citing and quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)).[1]

The Standard of Proof Below Raises A Due Process Issue

Hammond next argues that "there is no constitutional question presented by the standard utilized by a state court in determining a motion to dismiss . . . ." (Brief in Opp., at 22) This argument is also without merit.

Due process requires that any assertion of state court jurisdiction not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326

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1 Hammond principally relies on *Youakim v. Miller*, 425 U.S. 231 (1976), for his argument on this point. In that case only equal protection grounds were urged by appellants below. In this Court appellants raised an entirely separate constitutional basis—the supremacy clause—to attack a state's federally subsidized foster care payment scheme. Notwithstanding appellant's failure to raise the supremacy clause argument below, this Court entertained the new constitutional claim under the "exceptional cases" doctrine of *Duignan v. United States*, 274 U.S. 195, 200 (1927). The "exceptional cases" doctrine is irrelevant here because Kramer raised a due process claim below, and the petition only raises due process claims.

U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Imposition of procedural rules plainly favoring one party must, if anything does, offend traditional notions of fair play. In circumstances when both parties have engaged in expensive and time consuming discovery, in which evidence supporting and opposing jurisdiction has been adduced, the *prima facie* standard, nevertheless, requires a court to consider only one party's evidence. After substantial discovery, due process can only be satisfied if a court is required to evaluate the evidence of both sides, and determine whether a rational trier of fact could find for a plaintiff on the jurisdictional issue. Due process requires a level playing field, and the *prima facie* standard tilts the field for a plaintiff. This is fundamentally unfair.

Moreover, under Hammond's analysis a state court would be given absolute discretion to impose any standard of proof it chose, presumably even less than *prima facie* proof, in deciding a pretrial motion raising issues under the due process clause. This assertion is wrong. As this Court recognized in *Addington v. Texas*, 441 U.S. 418 (1979), the standard of proof used by a state court in resolving constitutional claims raises a fourteenth amendment due process issue.

Hammond's Conspiracy Theory is Inapposite

Apparently recognizing the constitutional inadequacy of the opinion below, Hammond seeks to justify the result reached by the South Carolina Supreme Court on a conspiracy theory.[2] The petition asserts that Kramer failed to pur-

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2 While the South Carolina Supreme Court upheld long-arm jurisdiction over Kramer on Hammond's mere allegations of conspiracy (388 S.E.2d at 798, App. to Pet. for Cert., at 5a), its due process analysis did not rely on a conspiracy theory. (388 S.E.2d at 798-99, App. to Pet. for Cert., at 5a-6a.)

This Court has never adopted a conspiracy theory of personal jurisdiction. Moreover, the constitutional legitimacy of jurisdiction based on conspiracy has been questioned in a number of recent articles. *See* Althouse, *The Use of*

posefully direct activities at South Carolina in a manner sufficient either to invoke the benefits and protections of South Carolina law, or to reasonably anticipate litigation in South Carolina. (Pet. for Cert., at 20-25.) Thus, traditional minimum contacts could not be established. Recognizing that minimum contacts cannot be found on contacts proximately resulting from actions by Kramer himself, Hammond seeks to supply the missing "minimum contacts" by his conspiracy theory: ". . . Kramer engaged in a series of activities over a several month period of time, which involved him working with South Carolinians (who were located in South Carolina) in a scheme directed at another South Carolinian." (Brief in Opp., at 17.)

Hammond made the same arguments in both the trial court and the South Carolina Supreme Court. Neither court below relied on Hammond's conspiracy theory in upholding personal jurisdiction over Kramer. There is a compelling reason why the courts below failed to adopt Hammond's conspiracy theory. Hammond metaphysically created a conspiracy that is not supported by a scintilla of evidence adduced during a year of discovery. The claim is pure fiction. It is based on innocent facts to which Hammond attributes sinister motives and is wholly grounded on unsupported inferences. Hammond failed even under the weak *prima facie* standard to convince the courts below that his conspiracy claim, which he repeats here, was sufficiently credible to support due process.[3]

Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis, 52 Fordham L. Rev. 234 (1983); Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Calif. L. Rev. 1 (1986); Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506 (1984).

3 Only a complete review of the Transcript of Record before the South Carolina Supreme Court could reveal the full scope of Hammond's misleading statements. We reluctantly burden the Court with a few examples of

The petition asks this Court to review the decision and opinion of the South Carolina Supreme Court. Hammond's conspiracy theory obfuscates this request. The conspiracy theory need not be addressed by this Court to decide the issues presented. Notwithstanding Hammond's arguments, the national importance and substantiality of the questions presented cannot be denied.

Hammond's misleading statements. These examples alone establish that the Brief In Opposition lacks credibility.

First, Hammond claims that Kramer drafted a subscription agreement with Evins allocating Hammond 70% of the company. (Brief In Opp., at 2.) The drafts in the record prove precisely the contrary. Kramer prepared a draft subscription agreement leaving blank spaces for the names and number of shares to be allocated to subscribers (R. 82, 587), and by letter requested his clients and Hammond's counsel to fill in the blanks. (R. 487, 1088.)

Second, Hammond claims that Kramer lied to him to induce him to sign the subscription agreement. (Brief In Opp., at 2-3) Hammond's own deposition testimony established that Hammond did not talk to Kramer during the period in which any such inducement could have occurred. (R. 454-55) Moreover, Hammond admitted that he approved stock for Kramer after discovering the alleged misstatements of Evins. (R. 449.)

Third, Hammond claims that Kramer acted as his lawyer. (Brief In Opp., at 2 n.2, 10 ¶ "3") In his state court action in New York, however, Hammond admitted that Kramer did not act as his lawyer. There Hammond claimed that Kramer acted as lawyer for the proposed Delaware corporation. (Kramer's South Carolina Sup. Ct. Reply App., at R-25, containing an excerpt from Hammond's New York papers.)

Fourth, Hammond claims that Kramer caused the option to lapse. (Brief In Opp., at 8-9) It is undisputed that the option could not be exercised without the proceeds of the Michael Reese closing, and that the Michael Reese contract required a letter of credit. (R. 52-53, 256, 695-700.) Documentary evidence in the record establishes that Wallace would not release the letter of credit without Hammond's guarantee, which Hammond declined to provide. (R. 264, 356, 426.)

Fifth, Hammond claims that Kramer and Evins masterminded a conspiracy to reduce his interest by 60,000 shares. But Hammond admits that Kramer and Evins received only 18,000 shares. This fact alone undermines the credibility of his claims.

CONCLUSION

For the reasons stated, the Brief in Opposition is without merit, and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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